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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

IF YOU have not already done so, may I suggest that you read Past President Dodd's address beginning on page 247 of the July, 1956, issue of our Journal. His word picture most graphically portrays the passing of a great segment of our profession popularly termed "The Trial Lawyer." His remarks are timely and should awaken in each one of us a deep concern for the future security of our trial system which is the protector of our freedoms.

Also, I recommend that you read "Shall Advocacy Vanish?", an address delivered by Past President J. A. Gouch before the Washington State Bar Association. You will find it in this issue, beginning on page 385.

Unfortunately, some members of our own profession are too willing to criticize those of us who appear for the defense. This is apparent from an article which appears in the September, 1956, issue of the American Bar Association Journal. Such writers argue from faulty premises, but our criticism must be constructive, and by good example we must continue to carry on the trial work for an industry which has made a most valuable contribution to the successful economy of our country.

Our able Journal Editor and I ask that you continue to supply him with articles for publication, and we express our appreciation to all who have contributed thus far.

I recently returned from a trip to Atlantic City where, in the company of Arthur Blanchet, Richard Galiher and Frank O'Kelley, advance preparations were made for our 1957 convention. Despite the high standards established by previous conventions, I am confident that our meeting at the Chalfonte-Haddon Hall Hotels will be instructive and entertaining in delightful surroundings such as we have grown accustomed to expect. You may anticipate receiving the usual convention reservation announcement from our Executive Secretary shortly after January 1, 1957. Please make your reservations immediately after receiving that letter so you may secure a confirmed reservation promptly and avoid any disappointment.

The Mid-Winter Meeting of the Executive Committee will be held at the Key Biscayne Hotel and Villas, Miami, Florida, beginning January 28, 1957.

JOHN A. KLUWIN
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CURRENT DECISIONS

In each issue of the Journal there will be published two or three pages of Current Decisions. These will be brief digests of recent cases of particular interest to insurance lawyers. All members of the Association are urged to participate in this important feature of our Journal.

Reports of Current Decisions should be sent to your State Editor. Full credit will be given to all contributors.

CHILD'S TORT ACTION AGAINST PARENT— WRONGFUL DEATH ACTION BY ADMINISTRATOR WHERE NEXT OF KIN IS PRINCIPAL DEFENDANT

In *Nudd, Administrator, et al., v. Matsoukas, Sr., et al.,* 7 Ill. 2d 608, 131 N. E. 2d 525, reversing 6 Ill. App. 2d 504, 128 N.E. 2d 609, Matsoukas, Sr., driving a motor vehicle on a public highway in Illinois, was involved in an accident in which a minor son passenger was injured and a minor daughter was killed. Complaint filed by Nudd, Administrator of deceased daughter and next friend of injured son, alleged wilful and wanton driving on the part of Matsoukas, Sr. Motions to dismiss the wrongful death action and the injury count of the minor son were sustained in trial and appellate courts following the established rule in Illinois of *Hazel v. Hoopeston-Danville Motor Bus Co.,* 310 Ill. 38, on the wrongful death count, and *Meece v. Holland Furnace Co.,* 269 Ill. App. 164, on the rule supporting parental immunity.

The issues presented for decision by the Illinois Supreme Court were: (1) Can the administrator of an estate maintain a tort action under the wrongful death statute where one of the surviving next of kin is a principal defendant? The court answered, "yes," to this question, saying:

> "We have, accordingly, determined that the conclusion reached in Hazel v. Hoopeston-Danville Bus Co. 310 Ill. 38, was not required by statute nor by any recognized rules of common law. In application it achieved the result of depriving innocent plaintiffs of a right granted by statute and permitted defendants to shield themselves from liability by their own guilt. No doctrine of stare decisis requires us to perpetuate such an anomalous rule. We, accordly, hold that the negligence of the defendant-beneficiary does not bar the action but, rather, prevents his right to recover for pecuniary loss. In so far as Hazel v. Hoopeston-Danville Bus Co. 310 Ill. 38, and other cases cited, are inconsistent with this decision they are hereby overruled."

(2) Can a minor sue his father for wilful and wanton misconduct? The court held, "yes," saying:

> "We consider the question before us a novel one in Illinois. The Appellate Court decisions cited to us do not determine the question of parental immunity in case of wilful and wanton misconduct. Any justification for the rule of parental immunity can be found only in a reluctance to create litigation and strife between members of the family unit. While this policy might be such justification to prevent suits for mere neglgence within the scope of the parental relationship we do not conceive that public policy should prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent. To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress, without any corresponding social benefit, for an injury long recognized at common law."

(Contributed by John H. Royster, State Editor for Illinois, Peoria, Illinois).

* * *

CAUSE OF ACTION— PERSONAL INJURY AND PROPERTY DAMAGE

In the recent decision of *Miles v. De Wess,* 93 S.E. 2d 484 (W. Va. 1956), the West Virginia Supreme Court of Appeals considered the right of an injured person, who had already recovered a judgment for personal injuries, to institute an action for damage to his automobile, against the same defendant, arising from the same accident. The court, after reviewing decisions from many other states, adopted the rule that a single act of negligence gives only a single cause of action and therefore the elements of damages, consisting of injury to person and property, must be joined

in one action. The plaintiff was denied the right to recover the property damage. The court said that was the majority view in the United States.

It also pointed out a vice in this view. That is that a subrogee, who has paid some of the property damages, may bring an action for property damage in the name of the insured and thus preclude the insured from thereafter bringing an action to recover for personal injuries. It also referred to the other situation in which the insured, by recovering for personal injuries, would preclude its property damage insurance company from maintaining an action for its loss.

The court referred also to the vice of the minority view, which permits the splitting of a single cause of action and thus allows a defendant who has committed only a single wrong to be subjected to two or more actions for that one act.

It would appear that property damage insurance companies in West Virginia, in settling with an insured, will have to conduct a full and free dscussion with him. Obviously, no insurance carrier would want to be in the position of having prevented a badly injured person from recovering, because the insurance carrier, under a subrogation agreement, had instituted the first action for property damage.

On the other hand, the insured should be advised of the rights of his property damage company. There would seem to be no real objection, if the insured is going to sue for his personal injuries, to including a claim for property damages in that action. (Contributed by Paul S. Hudgins, State Editor for West Virginia, Bluefield, West Virginia).

Editor's Note: The Ohio case of *Vasu v. Kohlers*, 145 O.S. 321, 61 N.E. 2d 707, 166 A.L.R. 855, reaches the opposite conclusion.

* * *

JOINT TORTFEASOR—RELEASE OF

The case of *Morris v. Diers*, S. Ct. of Colorado, July 2, 1956, 298 P. 2d 957, was on wherein the plaintiff, injured in an automobile accident, sued the drivers of two different cars allegedly responsible and thereafter, for a consideration, stipulated for dismissal with prejudice as against one defendant driver. The dismissal was held to constitute a release of a joint tort-feasor which released the other, even though plaintiff's intent not to release the other, was manifested in the stipulation. The court said that this result obtained whether the suit was for joint, concurrent or successive torts, although the opinion does not give information as to the negligence alleged other than that the car of one defendant struck that of the other defendant (without identification of defendants) which in turn struck the plaintiff. (Contributed by H. Gayle Weller, State Editor for Colorado, Denver, Colorado).

* * *

AUTOMOBILE OWNER—"FOR THE BENEFIT OF"

In the Georgia Law Reporter of August 24, 1956, is a case of *Shropshire v. Caylor, et al.*, 94 Ga. App. 37, which is the first case construing the "For the Benefit of" provision of Code Section 68-301. In the decision, the court recognizes this by saying, "No judicial construction of this act has previously been given by this court or the Supreme Court."

Shropshire turned his automobile over to Jones, an employee of Tate and Lewis Service Station to have it washed and greased and then delivered back to Shropshire's home. Jones, in driving it back to Shropshire's home, was involved in an accident with Caylor who filed suit against Shropshire and the service station. The court held that Jones was the agent of the service station which was the bailee and not of Shropshire, the bailor. In headnote two, however, the court held that the "... vehicle was, at the time the injuries were inflicted, being operated for the benefit of such owner and pursuant to his instructions. It (the petition) is accordingly sufficient to render the defendant owner liable for the negligence of the operator under the provisions of Code Section 68-301, which extends the liability of the owner of an automobile to cover the negligence of the driver where the car is being operated 'for the benefit of such owner'."

In the decision the court says that the allegations "are certainly sufficient to show that the car was being used in a manner in which the owner desired it to be used." Further: "Where an article is bailed to another for the purpose of making repairs on it for a consideration, the bailment is in its inception for the mutual benefit of both

the bailor and the bailee. . . . Since such transactions are for the benefit of both the bailor and the bailee, the automobile of the defendant while being thus returned to him was 'being operated for the benefit of such owner.' "

Finally, the court says:

> "The effect of this law is to extend the liability of owners of motor vehicles and to render them liable for the imputed negligence of another, where, under pre-existing law, there would be no such liability, and in effect makes proof of the benefit conferred on the owner the equivalent of proof of agency so as to impute the negligence of the operator to the owner."

(Contributed by Charles D. Hurt, State Editor for Georgia, Atlanta, Georgia.)

* * *

FIRE INSURANCE–AMBIGUITY–DAMAGE CAUSED BY A BLOWOUT

Plaintiff's equipment was being used in the drilling of a gas well when it was damaged by fire. The policy excluded damage "caused by or incident to blowout. . . or any fire loss or damage resulting therefrom." In suit against the insurer, Judge A. Sherman Christenson, of the U.S. District Court for the District of Utah, held for the defendant. There was a "battle of experts" as to whether a blowout occured. Judge Christenson says, "Merely because experts or attorneys differ as to the meaning of a term does not demonstrate that it is an ambiguous one to be resolved favorably to an insured. *Thomas v. Continental Casualty Company,* 10 Cir., 1955, 225 F. 2d 798; *Commercial Standard Fire and Marine Company v. Beard Well Servicing Company,* 10 Cir., 1954, 210 F. 2d 560." Pointing out that the case turns upon a rather narrow question of fact, the court says, "It cannot be fully resolved upon the basis of direct testimony, and the expert testimony is not conclusive either way. The physical facts and matters of common knowledge must be looked to primarily for the answer. There seems no reason why circumstantial evidence cannot be considered in this as in other cases, *The Rocona v. Guy F. Atkinson Co.,* 9 Cir., 1949, 173 F. 2d 661; *Auto Transport v. Potter,* 8 Cir., 1952, 197 F. 2d 907; *The Wenona,* 19 Wall. 41, 22 L. Ed. 52. And physical facts within common knowledge and reason may be sufficient to establish the truth of a matter, especially as against inconclusive evidence or speculation to the contrary. *Baltimore & O.R. v. O'Neill,* 6 Cir., 1911, 186 Fed. 13; *Rosenberg v. Baum,* 10 Cir., 1946, 153 F 2d 10." *Equity Oil Company v. National Fire Insurance Company of Hartford.,* No. C-174-55, U.S.D.C., Utah, decided September 7, 1956 (as yet unreported).

* * *

OWNER–OCCUPIER'S LIABILITY–ASSUMPTION OF RISK–CONTRIBUTORY NEGLIGENCE

The liability of an owner-occupier of premises to an employee of an independent contractor injured by the collapse of a storage tank which such employee was helping to dismantle was held for the jury in *Sullivan v. Shell Oil Company,* 9th Cir., 234 F. 2d 733, decided July 31, 1956. The court ruled that as to business guests or invitees, the owner-occupier is "obliged to exercise ordinary care to keep the premses in a reasonably safe condition, or to warn *** of danger." It held that the duty is "not limited to conditions actually known***to be dangerous", but extends also to "conditions which might have been found dangerous by the exercise of reasonable care."

Comparing the defenses of contributory negligence and assumption of risk, the court says, "The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts (1941), p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest. Torts, Sec. 893). Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk. *Hayes v. Richfield Oil Corp.,* 38 Cal. 2d 375, 385, 240 P. 2d 580; ***".

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NEW YORK MID-WINTER LUNCHEON

The fifteenth annual mid-winter cocktail party and luncheon for all members of the Association and their families and guests will be held on Saturday, January 26, 1957, in the Music Room at the Hotel Biltmore, 43rd Street and Madison Avenue, in New York City.

As usual, notices will be mailed to all members in New York, New Jersey, Pennsylvania and Connecticut. Others desiring to attend should write to Chairman Price H. Topping, 50 Union Square, New York 3, New York, for reservations.

The cocktail party will begin at 11:30 A.M. and the luncheon is scheduled for 12:30 P.M. The total cost, including tips, is $7.00 per person.

Among the guests expected to attend this year's festivities are President and Mrs. John A. Kluwin, President-Elect and Mrs. Forrest A. Betts, Past President and Mrs. Lester P. Dodd, Treasurer and Mrs. Charles E. Pledger, Jr., David Maxwell, President of the American Bar Association, and Leffert Holz, Superintendent of Insurance of the State of New York.

Serving with Mr. Topping on the permanent committee on arrangements are Milton L. Baier and Ernest W. Fields.

Report of the Accident and Health Committee—1956

J. H. GONGWER, *Chairman*
Mansfield, Ohio

THE past year has not been particularly significant in the accident and health insurance field for the reason that most of the State Legislatures did not meet.

Georgia—New regulations governing the sale of accident and health insurance were enacted. These regulations require, among other things, that explanatory words be placed on insurance policy delivery envelopes and for refund of initial premiums, upon request, within ten (10) days. A 1956 law, S.B. 14, approved March 6, 1956, effective July 1, 1956.

South Carolina—Act 925, Acts 1956, H. B. 1985, approved and effective March 27, 1956, provides that the conditions of renewability must be prominently stated in an accident or health or hospitalization policy. The act further provides for the surrender of accident, health or hospitalization policies where they have been solicited or negotiated by deceptive advertising or by misrepresentation of the insurer. Provision is also made for the return of the premiums paid on such policy. The uniform individual accident and sickness policy provisions law was adopted effective January 1, 1957.

Act 898, Acts 1956, H. B. 1817, effective March 27, 1956, prohibits the making of misleading or fraudulent representation for the purpose of inducing or intending to induce any person to convert or terminate in any manner any life or disability policy.

Act 929, Acts 1956, H. B. 1983, effective March 27, 1956, limits the right of insurance companies to cancel individual accident and health or hospitalization insurance policies to a period of six months in the first policy year. The exercise of any such right thereafter is prohibited .

Another law, Act 926, extends the period of time for the giving of notice of intent not to renew an accident and health or hospitalization policy.

Ohio—Amended Sub-House Bill 881 became effective July 1, 1956. This is a thirteen page bundle of new regulations which grants new and enlarged rulemaking powers to the Superintendent of Insurance; prohibits the company from canceling a policy but permits it to refuse renewal on any anniversary date. It permits the insured to cancel at any time by giving written notice to the insurer, effective upon receipt, or at such later date as may be specified in the notice. The insurer is obligated to return the unearned portion of the premium. Chronic conditions excluded from policies must be by name or specific description. False statements made in the application shall not bar the right to recovery thereunder or be used in evidence at any trial to recover upon such policy unless it is clearly proved that such false statements are willfully false; that they were fraudulently made and that they materially affect either the acceptance of the risk or the hazzard assumed by the insurer and that they induced the insurer to issue the policy, but that for such false statement the policy would not have been issued. The act further provides that any person who solicits sickness or accident insurance shall be considered the agent of the insurer and not the insured in any controversy resulting from the issuance or reinstatement of a policy.

The Federal Trade Commission in a three to two decision has ruled that it has jurisdiction over the matter of advertising of accident and health insurance in interstate commerce. The decision was made by the F.T.C. in connection with a ruling that the American Hospital and Life Insurance Company must stop alleged misrepresentations in advertising its accident and health policies with respect to illnesses covered by the policy, amounts paid for each, and maternity benefits. There was a vigorous dissenting opinion by Commissioner Mason who observed that the majority opinion would transfer the entire control of the insurance business in interstate commerce to the Federal Government. The opinion of the majority held that the McCarran-Ferguson Act of 1945 was designed to permit traditional state regulation and was not intended as an abdication of the Federal jurisdiction under the Sher-

man, Clayton and Federal Trade Commission Acts over the business of insurance.

There seems to be a growing feeling among legislators, bureaucrats and administrative agencies that accident and health insurance is part of the social security program and that benefits should be paid to a claimant regardless of the contract, once the policy has been issued. There has been no inconsiderable criticism, and rightly so, of misrepresentation, particularly on the part of some mail order insurers. Legislation has likewise been directed to correcting this evil. However, no voice has been raised concerning the dishonest insured; no criticism of misrepresentations or concealments whether they be intentional or unintentional. The legislation seems to be directed toward making it almost impossible to void a policy on account of misrepresentations or concealments on the part of the applicant. The law of contracts and actuarial practices are among the concepts which appear to be overlooked. There is no question but that the law should protect the innocent and every policy holder should get what he pays for and, in the first instance, should be advised of the nature and extent of his policy. The law, however, should not give to the policy holder much more than he bought. In other words, it appears to be time to observe that the administrative agencies, bureaus and courts, even the Supreme Court of the United States, should revert to legal principles rather than looking to sociologists and psychologists as authority.

Respectfully submitted,

J. H. Gongwer, *Chairman;* Emory A. Cantey, *Vice-Chairman;* Leonard G. Muse, *Ex-Officio;* Harold G. Baker, Sam Rice Baker, Ralph C. Body, Stanley M. Burns, Thomas J. Long, Samuel P. Orlando, Hugh E. Reynolds, John H. Royster, Tom L. Yates, George D. Young.

Report of Automobile Insurance Committee—1956

S. Burns Weston, *Chairman*
Cleveland, Ohio

THE subject selected by the committee was determined by the members present at the meetings in Coronado in July, 1955, and through subsequent correspondence with all members.

The subject: *The Legal Effect and Relative Merits of a Reservation of Rights and/or Non-Waiver Agreement.*

Our report is truly a committee report. The committee consists of 17 members, including one ex-officio member and the chairman. Only one member was unable to participate. Fifteen members submitted reports covering 17 states and the District of Columbia. In addition, 31 members of the association covering 31 states accepted an invitation to assist the committee. Thus, this report consists of the work of 46 members of the association, plus your chairman. Whether as many people have participated in a committee report on any previous occasion we do not know, but we think the number that made this report possible is significant and too much credit cannot be given to each of those who shared the responsibility.

Definition

A non-waiver agreement is a *bilateral* stipulation signed by the insurance company and its insured which reserves to each their respective rights under the insurance policy, with the understanding that any action taken by either shall not constitute a waiver of those rights.

A reservation of rights is in effect the same thing as a non-waiver agreement, except that it is an *unilateral* notification by the insurance company to the insured of its intention to reserve all of its rights under the insurance policy.

Legal Effect

From the committee's review of the law in each of the 48 states and the District of Columbia we find no instance in which a court has held a reservation of rights or a non-waiver agreement to be invalid in itself. Generally, they have been held valid and binding where there has been timely notice and no subsequent waiver by the insurer.

From an analysis of the cases, as well as from opinions expressed by those who have made this report possible, there are a few recommendations or observations of general interest as follows:

1. Legally speaking, there is nothing to indicate that a non-waiver agreement is more preferable than a reservation of rights, or vice-versa. The validity of both depends primarily upon whether timely notice was given or whether anything was done by the insurer that would deny it the right to benefit from the reservation or non-waiver agreement.

2. Most members of the committee prefer the non-waiver agreement because: (a) it eliminates the question as to whether notice was given; (b) when an insured signs a non-waiver agreement he may be more unwilling to sue the company under the policy; and (c) the court or jury is more likely to be sympathetic to an insurer who has the insured's signature than where it is an unilateral action.

3. Some members prefer the reservation of rights because: (a) an insured cannot be forced to sign the non-waiver agreement; (b) if the assured does not acquiesce then a declaratory judgement procedure can be initiated; and (c) a reservation of rights sent by registered mail normally serves the same purpose.

4. Both a non-waiver agreement and a reservation of rights should specify the nature of the claimed defense under the policy.

5. Timely notice to the insured is essential, particularly when a reservation of rights is used. Undue delay may constitute waiver or estoppel.

6. In states with financial responsibility acts and statutes permitting supplemental petitions to be filed, the claimant likewise should be put on notice that a reservation of rights has been sent or that there is a non-waiver agreement.

7. A reservation of rights should be sent by registered mail.

8. Some recommend that a reservation of rights should contain a place for the insured's signature by way of acceptance. Others feel this may endanger the validity of the instrument if the signature is not obtained.

Our report lists state by state the cases in which the legal effect of a reservation of rights or a non-waiver agreement has been considered. In some states there have been no decisions. Space prevents a detailed discussion of any case. This report itself represents a condensation of a total of 180 pages of reports from those who have participated. Opposite the name of each state is the name of the member of the committee and/or association who investigated the law in the respective states.

For a general discussion of non-waiver agreements, see 76 A.L.R. 169, 123 A.L.R. 997 and 18 A.L.R. 2d 498. See also "Disclaimer, Letters of Reservation of Rights and Non-waiver Agreements Under Liability Insurance Policies," by C. M. Horn, Insurance Counsel Journal, October, 1940; "Insurance Responsibilities Under Reserved Rights," by Gervais W. Fais, Insurance Counsel Journal, October, 1948; "Disclaimer, Letters of Reservation and Non-waiver Agreements:—Developments From 1940 to 1950," by C. M. Horn, Insurance Counsel Journal, October, 1950.

ALABAMA—

Marvin Williams, Jr., Birmingham

Non-waiver agreements are valid. The following non-waiver agreement, which was approved in *Insurance Company of North America v. Williams,* 200 Ala. 681, 77 So. 159, probably is typical, except that it does not specify the nature of the possible defense under the policy:

"Any action taken, request made, or information received by said company or companies, while investigating and ascertaining the cause of said fire, and the amount of loss or damage, shall not in any respect or particular change, waive, determine, invalidate, or forfeit any of the terms, conditions, or requirements, of the policy or policies of insurance of the company or companies whose names are signed hereto, or any of the rights of any of the parties hereto. The intent of this agreement is to save and preserve all of the rights of all the parties, and permit an investigation of the claim and the determination of the amount of the loss and damage, in order that the party or parties making this request may not be unnecessar-

ily delayed in his business, and without prejudice to the liability of the company or companies, party to this agreement."

See also *Blackwood v. Maryland Casulty Company*, 24 Ala. App. 527, 137 So. 467; 25 Ala. App. 308, 150 So. 179; 227 Ala. 343, 150 So. 180 (involves automobile policy). For similar holdings involving fire policies see *Insurance Company of North America v. Williams*, 200 Ala. 681, 77 So. 159; *National Union Fire Ins. Co. v. Morgan*, 231 Ala. 640, 166 So. 24; *United States Fire Ins. Co. v. Smith*, 231 Ala. 169, 164 So. 70, 103 A.L.R. 1468; *North River Ins. Co. v. Flippo*, 236 Ala. 128, 181 So. 114.

A non waiver agreement was held waived in *Maples v. Milwaukee Mechanics Insurance Company*, 66 So. 2d 159, cert. denied 259 Ala. 189, 66 So. 2d 173.

It is felt that a reservation of rights letter also would be held effective.

ARIZONA–

Lawrence V. Robertson, Tucson

There are no Arizona decisions squarely passing upon the question, but a number of cases abstractly recognize their validity. The Arizona courts follow closely the California decisions concerning the construction of insurance contracts. It is believed in an actual test that a reservation of rights or non-waiver agreement would be upheld. As a possible interest see *Employers Casulty Co. v. Moore*, 142 P. 2d 414.

ARKANSAS–

John B. Thurman, Little Rock

The only Arkansas decision bearing upon the subject is *Home Indemnity Company v. Banfield Brothers Packing Company, Inc.*, 188 Ark. 683, 693, which implies approval of a reservation of rights agreement. An investigation made by the insurer would not be a waiver.

CALIFORNIA–

Walter Ely, Los Angeles

Both non-waiver agreements and reservations of rights letters have been held valid. See *Coolidge v. Standard Accident Ins. Co.*, 114 Cal. App. 716, 300 Pac. 885 (reservation of rights upheld); *Sears v. Illinois Indemnity Co.*, 121 Cal. App. 211, 9 P. 2d 245 (no waiver of non-waiver agreement by entering defense); *McDanels v. General Ins. Co.*, 1 Cal. App. 2d 454, 36 P. 2d 829 (reservation of rights on the basis of non-cooperation upheld); *Bear Film Co. v. Indemnity Ins. Co.*, 22 Cal. App. 2d 520, 71 P. 2d 603 (reservation of rights upheld).

See also *J. Frank & Co. v. New Amsterdam Cas. Co.*, 175 Cal. 293, 165 Pac. 927. It is pointed out that a reservation of rights should be just as adequate as a non-waiver agreement as a protection to the insurer against an insured who is reluctant to sign.

COLORADO–

Hamlet J. Barry, Jr., Denver

The only case in Colorado deals with a non-waiver agreement. Because of the strong statement by the court and the citations given, we quote the following from *General Accident Fire and Life Assurance Corporation v. Mitchell*, 259 P. 2d 862:

"Where an insurer takes the precaution of securing a 'non-waiver agreement' and thereafter enters its appearance for the insured and actively participates in the trial of a damage action arising under the provisions of the policy, neither estoppel nor waiver will preclude the insurer from asserting any right that it may have under its insurance policy in any action brought by the insured himself or the insured's judgement creditor in garnishment proceedings. We believe the following authorities directly or impliedly support us in our conclusion: Hardware Mut. Casualty Co. v. Higgason, 175 Tenn. 357, 134 S.W. (2d) 169; Ancateau, etc. v. Commercial Casualty Ins. Co., 318 Ill. App. 553, 48 N.E. (2d) 440; Hill v. Standard Mutual Casualty Co., 110 F. (2d) 1001; Kabinski v. Employers' Liability Assur. Corporation, Ltd., 123 N.J.L. 377, 8 A. (2d) 605; Birnbaum v. Pamoukis, 301 Mass. 559, 17 N.E. (2d) 885; Laroche v. Farm Bureau Mutual Automobile Ins. Co., 335 Pa. 478, 7 A. (2d) 361. McCann v. Iowa Mutual Liability Ins. Co. of Cedar Rapids, 231 Ia. 509, 1 N.W. (2d) 682; Hoosier Casualty Co. v. Miers, 217 Ind. 400, 27 N.E. (2d) 342; Manthey v. American Automobile Ins. Co., 127 Conn. 516, 18 A. (2d) 397; Goldstein v. Bernstein, 315 Mass. 329, 52 N.E. (2d) 559; Hodges v. Ocean Ac-

cident & Guarantee Corporation, 66 Ga. App. 431, 18 S.E. (2d) 28; Mancini v. Thomas, 113 Vt. 322, 34 A. (2d) 105; Clark Motor Co. v. United Pac. Ins. Co., 172 Ore. 145, 139 P. (2d) 570; Associated Indemnity Corporation v. Wachsmith, 2 Wash. (2d) 679, 99 P. (2d) 420; Mirich v. Underwriters at Lloyd's London, 64 Cal. App. (2d) 522, 149 P. (2d) 19; Eakle v. Hayes, 185 Wash. 520, 55 P. (2d) 1072; Continental Casualty Co. v. Lolley, 193 Okla. 22, 140 P. (2d) 1014; Snyder v. St. Paul Mercury Indemnity Co. of St. Paul (Texas Civil Appeals) 191 S.W. (2d) 107; 29 Am. Jur., pp. 672, 673 secs. 878, 879, 45 C. J. S., p. 864, et. seq., sec. 714; 6 Blashfield, Cyclopedia of Automobile Law and Practice, p. 94, sec. 4062; 5 Couch Cyclopedia of Insurance Law, p. 4187, et seq., sec. 1175 (e); Appleman Automotive Liability Insurance, p. 443; 81 A.L.R. 1382."

CONNECTICUT—

David S. Nixon, Hartford

Connecticut cases deal only with reservations of rights, which have been upheld. It is reasonable to assume that non-waiver agreements also would be determined valid. In *Ceasare Basta v. United States Fidelity and Guaranty Company,* 107 Conn. 446 (reservation of rights) the court said:

> "An insurer is not estopped to set up the defense that the assured's loss was not covered by the contract of indemnity by the fact that the insurer participated in the action against the assured, if at the same time it gives notice to the assured that it does not waive the benefit of such defense."

Sargent Mfg. Co. v. Travelers Ins. Co., 165 Mich. 87, 130 N.W. 211, 34 L.R.A. (N.S.) 491; *Brown v. Gunderson,* 123 Minn. 303, 143 N.W. 795; *Mason-Henry Press v. Aetna Life Ins. Co.,* 211 N.Y. 489, 105 N.E. 826; *Gordon v. Massachusetts Bonding & Insurance Co.,* 229 N.Y. 424, 128 N.E. 204; *Humphrey v. Polski,* 161 Minn. 61, 200 N.W. 812; 36 Corpus Juris, 1078.

See also *State v. Aetna Casualty & Surety Company,* 138 Conn. 363 and *Goergen v. Manufacturers Casualty Ins. Co.,* 117 Conn. 89.

DELAWARE—

W. H. Bennethum, Wilmington

Non-waiver agreements are valid, providing they are construed strictly. The only case on the question in *G.M.S. Realty Corp. v. Girard Fire and Marine Insurance Co.,* 89 A.2d 857, which held a non-waiver agreement was not sufficiently broad to take advantage of the assured's failure to file proof of loss. The court cites cases from Oklahoma, Alabama, Missouri and Georgia concerning what constitutes waiver or estoppel. See *Brooks Transportation Co. v. Merchants Mutual Casualty Co.,* 171 Atl. 207 and *Miller v. Northern Insurance Co.,* 39 Atl. 223.

DISTRICT OF COLUMBIA—

Wilbert McInerney, Washington, D.C (Federal Courts)

The United States Court of Appeals for the District of Columbia has not considered the question, but if presented it is apparent that both the non-waiver agreement and reservation of rights would be upheld.

Federal Court decisions indicate nothing contrary to the general rule among the state courts. *Myers v. Ocean Accident and Guaranty Co.,* 99 F. 2d 45, states:

> "These non-waiver agreements are a common incident of insurance litigation, and are valid and effective between the parties in the absence of action by the insurer inconsistent with the terms of the agreement."

See also *Bowen v. Cole,* 69 F. 2d 136 and *U. S. F. & G. v. Wyer,* 60 F. 2d 856.

Mr. McInerney feels that where financial responsibility acts are in effect it would be wise for the insurer to notify the claimant if the defense proceeds under a reservation of rights or non-waiver agreement. In this connection see *Hines v. Keystone Mutual Casualty Co.,* 26 A. 2d 761, 180 Md. 676, and *Farm Bureau Automobile Insurance Co. v. Martin,* 97 N.H. 196.

FLORIDA—

Harry T. Gray, Jacksonville

There are no Florida cases in point. However, the United States District Court for the Northern District of Florida seems to sustain a reservation of rights in *Columbia Casualty Co. v. Thomas,* 20 F. Supp. 251.

GEORGIA—

Alex W. Smith, Jr., Atlanta

The issue has not been litigated in Georgia, although non-waiver agreements and reservations of rights are used regularly. By way of dictum, Georgia courts have indicated approval of such instruments. See *Jones v. Georgia Casualty and Surety Co.*, 89 Ga. App. 181, 78 S.E. 2d 861, and *Hodges v. Ocean Accident & Guarantee Corp.*, 66 Ga. App. 413, 18 S.E. 2d 28. In this case an oral disclaimer, clearly stated and explained, is upheld.

IDAHO—

J. L. Eberle and Dale O. Morgan, Boise

None of the state courts in Idaho has ruled on the question. However, a reservation of rights was upheld in *Farmers Underwriter Association v. Wanner*, 30 F. Supp. 358, citing other federal cases as authority. It is expected that Idaho would follow the general rule.

ILLINOIS—

Paul H. Heineke and Arthur J. Baer, Jr., Chicago

There are no supreme court decisions, but appellate courts have upheld a non-waiver agreement in *Rodenkirk v. State Farm Mutual Auto Ins. Co.*, 325 Ill. App. 421, and also a reservation of rights in *Ancateau v. Commercial Casualty Ins. Co.*, 318 Ill. App. 553. See also *Hinchcliff v. Insurance Co. of North America*, 277 Ill. App. 109, and *Hill v. Standard Mutual Casualty Co.*, 110 F. 2d 1001.

INDIANA—

Donald J. VanAlsburg, Detroit, Michigan

A non-waiver agreement was upheld in *London Guarantee & Acc. Co. v. Siwy*, 35 Ind. App. 340, 66 N.E. 481.

From a practical standpoint a written notice to the assured reserving the rights appears to be sufficient. See also *Lever Brothers v. Atlas Assurance Co.*, 131 F. 2d 770, 4 F & C 457, re use of data supplied by the insured during investigation of a loss under a non-waiver agreement.

IOWA—

Edward J. Kelly, Des Moines

Iowa courts have not passed on the question but by implication would sustain a non-waiver agreement or reservation of rights if the insurer offers to the insured the right to defend against grounds for which the insurer is not liable and offers to cooperate fully with the insured. See *Jones v. Southern Surety Co.*, 230 N.W. 385. Such agreements or reservations are used as a matter of custom.

KANSAS—

Ralph W. Oman, Topeka

Both non-waiver agreements and a reservation of rights have been upheld, if timely and proper notice is given and the reasons are stated for questioning coverage. See *Snedker v. Derby Oil Co., Inc.*, 164 Kan. 640, 192 P. 2d 135; *Iowa Hardware Mutual Insurance Co. v. Burgen*, 178 Kan. 557.

KENTUCKY—

William A. Kelly, Akron, Ohio

There are no Kentucky decisions on the subject.

LOUISIANA—

A. R. Christovich, Jr., New Orleans

Non-waiver agreement upheld in *Sheeren v. Gulf Ins. Co. of Dallas, Texas*, 174 So. 380. By implication a reservation of rights would be sustained.

MAINE—

Brooks Whitehouse, Portland

Non-waiver agreement upheld in *Lunt, et al., v. Fidelity & Casualty Co.*, 139 Me. 218, and by implication in *Colby, pro ami, v. Preferred Accident Ins. Co.*, 134 Me. 18; *Albert v. Maine Bonding & Casualty Co.*, 144 Me. 20.

MARYLAND—

T. Benjamin Weston, Baltimore

Both non-waiver agreements and a reservation of rights have been upheld in the absence of actions amounting to waiver. Where rights are reserved without specifying the defenses, action of the insurer in investigating and retaining control makes it a jury question as to whether or not its right to deny was waived. *Lewis v. Commercial Casualty Company*, 142 Md. 472 (reservation of rights); *London v. Cosgriff*, 144 Md. 660 (failure to reserve rights fatal to insurer); *Columbia Casualty Co. v. Ingram*, 154 Md. 360 (jury issue whether a waiver under reservation of rights due to action of insurer); *Manufacturers Casualty Co. v. Roach*, 25 F. Supp. 852 (jury question where failure

to learn of breach until a few weeks before disclaimer) and *Western Casualty Co. v. Beverforden,* 93 F. 2d 166 (non-waiver agreement).

MASSACHUSETTS—

Franklyn J. Marryott, Boston

Non-waiver agreement is valid, but unequivocal reservation of rights letter with invitation to associate counsel and not rejected by insured also appears valid. *Salonen v. Paanenen,* 320 Mass. 568, 71 N.E. 2d 227.

MICHIGAN—

Ari M. BeGole, Detroit

Both non-waiver agreements and reservations of rights have been upheld providing they are timely. Non-waiver cases: *Briggs v. Firemen's Insurance Co.,* 65 Mich.52; *Oakland Motor Co. v. Fidelity Co.,* 190 Mich. 74; *Ratz v. Firemen's Insurance Co.,* 263 Mich. 583; *Fidelity and Casualty Co. of New York v. Board of County Road Com'rs,* 267 Mich. 193 (no non-waiver agreement involved but opinion describes circumstances under whch one will be held valid). Reservation of rights cases: *Sargent Manufacturing Co. v. Travelers' Insurance Co.,* 165 Mich. 87; *Kidd v. Minnesata Atlantic Transit Co.,* 261 Mich. 31; *Fidelity and Casualty Co. v. Vantaggi,* 300 Mich. 528; *Beals v. Central Mutual Auto Ins. Co.,* 269 Mich. 477, (reservation of rights invalid because of delay).

MINNESOTA—

J. Mearl Sweitzer and Palmer Benson, Wausau, Wisconsin and St. Paul

Non-waiver agreements and reservations of rights are recognized in Minnesota. Under the same limitations as in other states the notice must be timely and clear and acceptance by the assured by silent acquiescence or actual deed. Non-waiver agreement upheld: *Fletcher v. Minneapolis Fire and Marine Mut. Ins. Co.,* 80 Minn. 152, 83 N.W. 29. Where no notice or agreement insurer is estopped to deny coverage: *Tozer v. Ocean Accident and Guaranty Corp.,* 94 Minn. 478, 103 N.W. 509; *Tozer v. Ocean Accident and Guaranty Corp.,* 99 Minn. 290, 109 N. W. 410; *Oehme v. Johnson, et al.,* 181 Minn. 138, 231 N.W. 817.

Reservation of rights upheld: *Mann, et al., v. Employers' Liability Assurance Corp.,* 123 Minn. 305, 143 N.W. 794; *Eckert v. Joice, et al.,* 152 Minn. 440, 189 N.W. 125; *Marblestone Co. v. Phoenix Assur. Co.,* 169 Minn. 1, 210 N.W. 385; *Peterson v. Maloney,* 181 Minn. 437, 231 N.W. 790 (disclaimer notice insufficient); *Root Motor Co. v. Mass. Bonding & Insurance Co.,* 187 Minn. 559, 246 N.W. 118; *Security Ins. Co., et al., v. Jay,* 109 F. Supp. 87 (U.S. Dist. Ct., 2d Div.)

MISSISSIPPI—

Edward W. Kuhn, Memphis, Tennessee

Mississippi courts have not ruled on this issue, although it is understood that reservations of rights and non-waiver agreements are generally in use.

MISSOURI—

Wilder Lucas, St. Louis

Both instruments have been held valid, but a reservation of rights must indicate that the assured assents to it. Reservation of rights upheld: *Meyer v. Continental Casualty Company,* 22 S.W. 2d 867; *Helm v. Inter-Insurance Exchange,* 354 Mo. 935, 192 S.W. 2d 417 (although misrepresentation as to age not discovered until voir dire); *Schmidt v. National Auto and Cas. Ins. Company,* 207 F. 2d 301 (notice held waived). Non-waiver agreement upheld: *Linenschmidt v. Continental Casualty Company,* 204 S.W. 2d 295.

In Missouri insurance counsel much prefer non-waiver agreements.

MONTANA—

Cale Crowley, Billings

There are no Montana decisions but Montana courts construe insurance contracts rigidly. It is felt that a reservation of rights should specify that unless the assured consents to the terms as set forth in the letter, the insurance company will withdraw. Montana lawyers generally consider a reservation of rights or non-waiver agreement to be effective.

NEBRASKA—

John L. Barton, Omaha

The Nebraska courts upheld a reservation of rights. *Ford Hospital v. Fidelity & Casualty Company of New York, et al.,* 183 N.W. 656, 106 Neb. 311. See also *Hawkeye Casualty Company, v. Stoker, et al.,* 154 Neb. 466, 48 N.W. 2d 623. In the authority of these cases non-waiver agreements are likewise considered to be valid.

NEVADA—

John T. McLaughlin and John W. Barrett, Reno

There have been no decisions in Nevada concerning the legal effect of reservation of rights and non-waiver agreements.

NEW HAMPSHIRE—

Stanley M. Burns, Dover

Reservations of rights and non-waiver agreements have been upheld in New Hampshire. However, since the declaratory judgment statute was adopted in 1929, the common practice preferred by insurance companies is to file a declaratory judgment action before putting the company to the expense and exposure of a jury trial. See *Merchants Mutual Casualty Co. v. Kennett,* 90 N.H. 253; *American Insurance Co. v. Garage,* 86 N.H. 362; *Gibbs v. Lumbermens Mutual Casualty Co.,* 87 N.H. 19, 173 Atl. 372; *American Ins. Co. v. Rush,* 88 N.H. 383, 385; *LaPorte v. Houle,* 90 N.H. 50, 4 A.2d 649; *Travelers Ins. Co. v. Greenough,* 88 N.H. 391, 190 Atl. 129; *Liberty Mutual Ins. Co. v. Martel,* 88 N.H. 379, 192 Atl. 152; "Declaratory Judgment as Practiced in New Hampshire," by Stanley M. Burns, Insurance Counsel Journal, Volume XIX, Pages 137-139. Concerning non-waiver agreements see *LePorte v. Houle, supra,* 90 N.H. 50, 4 A. 2d 649; *Bowen v. Cote,* C.A. 1st N.H., 69 F. 2d 136; *Moulton v. Owler,* D. C.N.H., 5 F. Supp. 700; *McGee v. U. S. Fidelity & Guaranty Co.,* C.A. 1st N.H., 53 F. 2d 953; *Putnam v. Employers Liability Assurance Corp.,* 90 N.H. 74 4 A. 2d 353; *Sauriolle v. O'Gorman,* 86 N.H. 39, 163 Atl. 717; *Gibbs v. Lumbermens Mutual Casualty Co., supra,* 87 N.H. 19, 173 Atl. 372; *Bowen v. Mutual Casualty Co.,* 99 N.H. 107, 107 A. 2d 379.

NEW JERSEY—

J. Ralph Dykes, New York

A reservation of rights was upheld in *Neilson v. American Mutual Liability Insurance Company,* 168 Atl. 436, the reservation having been acknowledged by assured's counsel; *Zisko v. Travelers Insurance Company,* 189 Atl. 389, where assured did not acknowledge notice but permitted carrier to proceed with knowledge that it had disclaimed. It is expected that non-waiver agreements if tested would be upheld.

NEW MEXICO—

Pearce C. Rodey and Ray H. Rodey, Albuquerque

There are no cases on a reservation of rights. *Miller v. Phoenix Assur. Co., Ltd.,* 52 N.M. 68, 191 P. 2d 993, held there had been a waiver of the non-waiver agreement by conduct of the company in its investigation, but by implication the court would approve a non-waiver agreement in the absence of facts indicating it had been waived.

NEW YORK—

J. Ralph Dykes, New York

A reservation of rights was upheld in *Knauss v. Indemnity Ins. Co.,* 270 N.Y. 211; *Gordon v. Mass. Bonding and Insurance Company,* 229 N.Y. 424; *Weatherwax v. Royal Indemnity Company,* 250 N.Y. 281. In *Gerka v. F. & C. Company,* 251 N.Y. 51, the issue of the effect of the reservation of rights was left to the jury because the insured expressly disavowed the non-waiver.

Undoubtedly New York courts would uphold a non-waiver agreement which is considered more desirable because it leaves no question as to the existence of such an agreement.

NORTH CAROLINA—

Henry L. Anderson, Fayetteville

Myers v. Ocean Accident & Guaranty Corp., 99 F. 2d 485, CCA 4th upheld a non-waiver agreement; also, *Hayes v. Insurance Company,* 132 N.C. 702, 44 S.E. 404; *Sasser v. Insurance Company,* 203 N.C. 232, 165 S.E. 684. There is no case directly ruling on a reservation of rights, but see *State Automobile Ins. Co. v. York,* 104 F. 2d 730, CCA 4th in which a reservation of rights was involved but the case was decided on other grounds. Probably a reservation of rights would be held valid if timely notice is given and the assured knew of the disclaimer.

NORTH DAKOTA—

Gordon V. Cox and E. F. Engebretson, Bismarck

North Dakota courts have not ruled on the question. However, both instruments are used in the state. It is pointed out that if there is any problem of obtaining a non-waiver agreement it is better to use the reservation of rights rather

than receiving a refusal. Also, indiscriminate use may alienate the insured and psychologically may affect adversely the insured's cooperation.

OHIO—

Marshall H. Francis, Steubenville

Both agreements are valid in Ohio under the general requirements of timeliness and that they must not mislead or work an injustice. In some instances, such as use of a supplemental petition under Section 3929.06 of the Revised Code, it is suggested that the claimant also be notified that the insurer is not waiving policy defenses.

Non-waiver agreements were upheld in *Lockwood, et al., v. The Aetna Life Insurance* Co., 8 Ohio App. 444 and *Myers, et al., v. Ocean Accident & Guaranty Corp.,* 99 F. 2d 485 (4th circuit) in which the court said, "These non-waiver agreements are a common incident of insurance litigation, and are valid and effective between the parties in the absence of action by the insurer inconsistent with the terms of the agreement."

The following cases sustained a reservation of rights: *Basmajian-Fowler, Appellant v. State Automobile Mutual Insurance Co. et al., Appellees,* 142 Ohio St. 483; *Socony-Vacuum Oil Co. v. Continental Casualty Co.,* 144 Ohio St. 382; *Fidelity & Casualty Co. of N.Y. v. The Highway Construction Co.,* 48 Ohio App. 522. In *Brown v. Kennedy, et al.,* 141 Ohio St. 457 and *Venditti v. Mucciaroni, et al.,* 54 Ohio App. 513 the courts found no estoppel even though there were no agreements. But see *Hartford Accident & Indemnity Co. v. Randall, et al.,* 125 Ohio St. 581 and *Fidelity & Casualty Company of N.Y. v. Blansey,* 49 Ohio App. 556.

OKLAHOMA—

Paul C. Duncan, Oklahoma City

As in most other jurisdictions, defense without a reservation creates an estoppel. See *Tri-State Casualty Ins. Co. v. McDuff,* 134 P. 2d 342. It follows that non-waiver agreements are upheld. *Insurors Indemnity & Insurance Co. v. Archer,* 254 P. 2d 342. See *Gordon v. Continental Ins. Co.,* 76 P. 2d 1055, involving non-waiver agreement provisions of proof of loss of fire policy. A reservation of rights was sustained in *U. S. F. & G. v. Wyer,* 60 F. 2d 856, (10th circuit). See also *Traders & General Ins. Co. v. Rudco Oil & Gas Co.,* 29 F. 2d 621 (10th circuit). Both instruments are to be strictly construed and were not sustained in *Springfield Fire & Marine Ins. Co. v. Fine,* 216 Pac. 898.

OREGON—

Frank E. Nash, Portland

An *oral* reservation of rights was sustained in *Allegretto v. Oregon Automobile Insurance Co.,* 140 Ore. 538, 13 P. 2d 647. In *Clark Motor Co. v. United Pacific Insurance Co.,* 172 Ore. 145, 139 P. 2d 570, a written reservation was sustained, although the assured had refused to sign the agreement. See also *Journal Publishing Co. v. General Casualty Co.,* 210 F. 2d 202.

There are no Oregon cases involving non-waiver agreements, but there is little doubt they would be sustained. The prevailing practice uses the unilateral method. In the event of non-acquiescence, the declaratory judgment procedure is recommended.

PENNSYLVANIA—

William B. Mangin, Syracuse, New York

Both types of agreement are upheld in Pennsylvania. See *LaRoche v. Farm Bureau Mutual Co.,* 335 Pa. 478; *Orcutt v. Erie Ind. Co.,* 114 Pa. Supp. 493; *Speier v. Ayling,* 45 A. 2d 385; *Johnson v. Herman,* 101 Pa. Supp. 198; *Ferguson v. Man Ins. Co.,* 129 Pa. Supp. 276; *Zeitz v. Zurich,* 67 A. 2d 742. Again, timeliness is essential. See *Gross v. Kubel,* 315 Pa. 396; *Spector v. Grossman,* 115 Pa. Supp. 372; and *Cameron v. Berger,* 336 Pa. 229, in all of which reservations were sustained. Too much delay was found in *Graham v. U.S.F.&G.,* 308 Pa. 534; *Lewis v. Fidelity & Casualty Co.,* 304 Pa. 503; *Kelly v. Kass,* 35 A. 2d 531. See also *Ginder v. Harleysville,* 49 F. Supp. 745. In *Wachs v. Fidelity & Deposit Co.,* 248 Pa. 263, a reservation of rights was not upheld, but the decision has not been cited in subsequent cases. The declaratory judgment procedure is available in Pennsylvania.

RHODE ISLAND—

James C. Bulman, Providence

A reservation of rights was upheld in *DePasquale v. Union Indemnity Co.,* 50 R. I. 509, 149 Atl. 795, but there are no decisions involving non-waiver agreements, although they are used as a matter of

practice and undoubtedly would be sustained.

SOUTH CAROLINA—

Thomas B. Whaley, Columbia

Both methods of protecting rights under a policy have been used and have been approved by South Carolina courts. Non-waiver agreements approved in *Smith v. Harmonia Fire Insurance Co.,* 188 S.C. 484, 199 S.E. 698; *Crotts v. Fletcher Motor Company,* 219 S.C. 204, 64 S.E. 2d 540. See also *Ellis v. Metropolitan Casualty Ins. Co. of N. Y.,* 187 S.C. 162, 197 S.E. 510. Approving reservation of rights are *Edgefield Manufacturing Co. v. Maryland Casualty Co.,* 78 S.C. 73, 58 S.E. 969; *Joye v. South Carolina Mutual Insuance Company,* 54 S.C. 371, 32 S.E. 446.

SOUTH DAKOTA—

Karl Goldsmith and Warren W. May, Pierre

Both instruments are valid in South Dakota. In *Schmierer v. Mercer,* 67 S.D. 639, 297 N.W. 682, a non-waiver agreement was upheld. In *Ziegler v. Ryan,* 66 S.D. 491, 285 N.W. 875 and *Alderman v. New York Underwriters Ins. Co.,* 61 S.D. 284, 248 N.W. 261, the validity of a reservation of rights or non-waiver agreement is implied. Also see *Phelps v. Life Benefit, Inc.,* 67 S.D. 276, 291 N.W. 919.

TENNESSEE—

Edward W. Kuhn, Memphis

Tennessee courts have not ruled on this issue.

TEXAS—

Orrin Miller, Dallas

Both types of protection are approved in Texas but are construed strictly. See *Highway Ins. Underwriters v. Robinson Truck Lines,* Tex. Civ. App., 272 S.W. 2d 904; *New Amsterdam Casualty Co. v. Hamblen,* 144 Tex. 306, 190 S.W. 2d 56; *Utilities Ins. Co. v. Montgomery,* 134 Tex. 640, 138 S.W. 2d 1062; *Commercial Standard Ins. Co. v. Harper,* 129 Tex. 249, 103 S.W. 2d 143; *Home Ins. Co. of New York v. Lake Dallas Gin Co.,* 127 Tex. 479, 93 S.W. 2d 388; *City of Wichita Falls v. Travelers Ins. Co.,* Tex. Civ. App.; *Traders & General Ins. Co. v. Davis,* Tex. Civ. App., 142 S.W. 2d 826. All uphold non-waiver agreements, but see *Automobile Underwriters Ins. Co. v. Long,* Tex. Comm. App., 63 S.W. 2d 356, which appears to question them, although it does not represent Texas law today.

UTAH—

Rex J. Hanson and Ernest F. Baldwin, Jr., Salt Lake City

There are no court decisions in Utah. However, see Utah Insurance Code Annotated, 1953, Section 31-19-34, concerning waiver of policy provisions or defenses which permits insurer to enter into settlement negotations and investigation without waiving policy provisions. It is felt that the Utah Supreme Court construes any insurance coverage problem with unusual strictness.

VERMONT—

Charles F. Ryan and Franklin J. Maryott, Rutland, Vermont, and Boston, Massachusetts

In *Beatty v. Employers' Liability Assurance Corp., Ltd.,* 168 Atl. 919, 106 Vt. 251, the right to use a non-waiver agreement was approved, but in that case the insured refused to sign. The court held there must be acquiescence expressed or implied to avoid estoppel. Delaying until a few days before trial in declaring no coverage was fatal to the insurance company in *Mancini v. Thomas,* 34 A. 2d 105, 113 Vt. 283. Where insured refuses to permit the insurance company to defend and determine the coverage question later it is a better practice to obtain an action for a declaratory judgment. *Farm Bureau Mutual Automobile Insurance Company v. Houle,* 118 Vt. 154, 102 A. 2d 326. Based upon dicta in the Vermont cases a reservation of rights in which the insured acquiesces is valid, but insurer may not retain complete control without insured's consent.

VIRGINIA—

Edmund W. Hening, Jr., Richmond

The Supreme Court of Appeals of Virginia has not ruled directly on the question but see *State Farm Mut. Automobile Ins. Co. v. Arghyris,* 189 Va. 913, 55 S.E. 2d 16. There must be timely denial of liability or procurement of non-waiver agreements. *Fentress v. Rutledge,* 140 Va. 685, 125 S.E. 668. Cases of interest but not directly in point are *Harmon v. Farm Bureau Mut. Automobile Ins. Co.,* 172

Va. 61, 200 S.E. 616, as to late notice; *Shipp v. Conn. Indem. Co.*, 194 Va. 249, 72 S.E. 2d 343, as to cooperation clause; *Ocean Accident & Guaranty Corp. v. Washington Brick Co.*, 148 Va. 829, 139 S.E. 513 and *Andrews v. Cahoon*, 196 Va. 790, 86 S.E. 2d 173.

WASHINGTON—

Arthur T. Bateman, Seattle

Apparently the courts approve non-waiver agreements and reservations of rights, but the decision in *Hinton v. Carmody*, 186 Wash. 242, 57 P. 2d 1240, is somewhat ambiguous. A non-waiver agreement was approved in *Neil Brothers Grain Co. v. Hartford Fire Ins. Co.*, 1 F. 2d 904 (9th circuit). See also *Manheim v. Standard Fire Insurance Company*, 84 Wash. 16, 145 Pac. 992.

WEST VIRGINIA—

Howard R. Klostermeyer, Charleston

Apparently there are several cases involving implied waiver of defenses, but no decisions construing a non-waiver agreement or reservation of rights and there are no statutes bearing upon the question.

WISCONSIN—

Donald J. Van Alsburg, Detroit, Michigan

Both types of procedure are approved. See *Hickey v. Wisc. Mut. Ins. Co.*, 238 Wisc. 433, 300 N.W. 364; *Wisc. Transportation Co. v. Great Lakes Casualty Co.*, 241 Wisc. 523, 531, 6 N.W. 2d 708; *New Amsterdam Casualty Co. v. Simpson*, 238 Wisc. 550, 300 N.W. 367.

WYOMING—

Clarence A. Swainson, Cheyenne

The Wyoming Supreme Court has made no ruling on the question, but it is reasonable to assume that, if put to the test, Wyoming courts would be guided by many decisions in other states.

Respectfully submitted,

S. Burns Weston, *Chairman;* Walter Ely, *Vice-Chairman;* J. Mearl Sweitzer, *Ex-Officio;* Henry L. Anderson, Ari M. BeGole, Ralph J. Dykes, Marshall H. Francis, William A. Kelly, Edward W. Kuhn, William B. Mangin, Orrin Miller, Wilbert McInerney, Donald J. Van Alsburg, Thomas B. Whaley, Marvin Williams, Jr.

Report of Aviation Insurance Committee—1956

GERALD HAYES, JR., *Chairman*
Milwaukee, Wisconsin

IN LIEU of a formal committee report your Aviation Law Committee prepared two articles for publication in the Journal. The first one entitled, "The Helicopter Is Not An Airplane," was prepared by Gerald Hayes, Jr., and published in the January issue. The second was entitled, "Some Remarks on Private International Air Law," and was prepared by Mr. G. I. Whitehead, Jr., and published in the April issue.

In spite of the fact that no committee report is required, your committee feels that there were several banner decisions handed down during the past year which are of great import in the field of aviation law. We would feel derelict in our duty if we did not call these decisions to the attention of our fellow members and for that reason we are now summarizing them in this report.

In *Eastern Air Lines, Inc. v. Union Trust Co., et al.*, (C.A.D. C., 1955), 221 F. 2d 62, a Bolivian fighter plane collided over Washington National Airport with an Eastern Constellation. The court of appeals held that the United States could be liable for the negligence of its control tower operators and that the defense of governmental function was not available. The Supreme Court granted certiorari on December 5, 1955, and upheld this portion of the decision of the court of appeals. (76 *S. Ct.* 192.)

In *Northwest Air Lines v. Glenn L. Martin Co.*, (6 cir. 1955), 224 F. 2d 120, a Martin 202 crashed over Fountain City, Wisconsin, during a violent thunder

storm. The 202s were grounded and a defect was discovered in the form of a fatigue crack in the wing spar. The same defect appeared in several others upon inspection, after grounding all 202s. Martin modified the aircraft and Northwest again placed them in commission. Thereafter, Northwest sought recovery against Martin, grounded in negligence, for expenses incurred as a result of the grounding and repairing. A jury verdict in favor of Martin was returned and, upon appeal, the court decided that the jury was entitled to pass upon the question of negligence in aircraft design. However, the court held it was in error to submit the defenses of assumption of risk and contributory negligence to the jury. The court stated that in spite of the fact that Northwest had engineers and other personnel at the Martin plant during construction they were so relatively few in number that their activity could not indicate a complete knowledge on the part of Northwest as to the design and building of the aircraft and that Northwest actually relied upon Martin for safety of design and construction.

The petition for certiorari was denied on January 9, 1956, (76 *S. Ct.* 308). The court of appeals had reversed the trial court and ordered a new trial because of the improper form of the special verdict.

Probably the most publicized decision was the one in *Allegheny Airlines, Inc., et al., v. Village of Cedarhurst,* (D.C. E.D. N.Y.), 132 F. Supp. 871. The village had enacted an ordinance prohibiting flight below 1000 feet while approaching or taking off from Idelwild Airport. The ordinance was declared unconstitutional and the village was permanently enjoined from enforcing it. The court held that Congress has pre-empted the field of regulation of air traffic engaged in national commerce, and that the navigable air space subject to regulation includes runway approaches.

In *Scholnik v. National Airlines, Inc.* (6 cir. 1955), 219 F. 2d 115, an Ohio resident sued National Airlines, Inc., in Ohio. National was a Florida corporation and the accident occurred enroute from Havana to Miami. National had no flights in or out of Ohio, but did have an interchange agreement wth Capital Airlines, which did operate in and out of Ohio. These interchange agreements allow passengers to board one airline and secure thru service without change of aircraft and the plane is operated by crews of the interchange airline over its own routes. The thru service afforded Ohio passengers by Capital Airlines, with its interchange set up with National, was found to be a sufficient business operation on the part of National in the state of Ohio so that service of process could be made upon National Airlines by service upon Capital. For all practical intents and purposes the court has held an airline engaged in commerce, even though limited to specific routes and destinations, is susceptible to service of process in a jurisdiction wherein any of its interchange airlines operate.

Your commttee has decided not to prepare any statement on the Warsaw Convention Amendment Protocol until such time as the Air Co-ordinating Committee invites comments. In the meantime, we can evaluate the position and thoughts of other interested groups.

Respectfully submitted,

Gerald Hayes, Jr., *Chairman;* Robert E. Plunkett, *Vice-Chairman;* Richard W. Galiher, *Ex-Officio;* M. Cook Barwick, Samuel O. Carson, Donald L. Case, Willis H. Flick, Payne Karr, Roger Lacoste, L. Duncan Lloyd, W. Percy McDonald, Jr., George W. Orr, Philip J. Schneider, George I. Whitehead, Jr.

Report of Fidelity and Surety Insurance Committee

H. Ellsworth Miller, *Chairman*
Baltimore, Maryland

COMMITTEE members have been active during the past year in the continuing developments in the fidelity and surety field, and through their efforts two surety articles were published in the January, 1956, issue of the Journal. These articles were, "The Problem of Balancing Equities in Subrogation Cases," by Thomas P. Powers, of the firm of Jacobs, Miller, Hopkins & Rooney, Chicago, Illinois; and, "Timely Review of Bankers Blanket Bond," by Bryan W. Tabor, of the firm of Rucker, Tabor & Cox, Tulsa, Oklahoma.

The subjects treated are comprehensively covered and could well be considered as required reading for those wanting to keep abreast in the field.

Fidelity matters, while sometimes not as spectacular as contract surety matters, nonetheless are of great importance. Accordingly, while in a report such as this it is not possible to exhaustively treat the subject, the committee does feel it is advisable to list some of the more important cases involving inventory shortages, and to also call attention to several cases on other phases of fidelity law, which it feels to be of more than just passing interest.

It is felt advisable to list some of the more recent and important cases on inventory shortages due to the fact that there appears to be continuing controversy concerning them. We, therefore, list them without comment, but under the headings as to whether decided favorably or unfavorably for the surety.

Inventory Shortage Cases Decided Favorably to the Surety

Lawson v. American Motorist Insurance Co., 217 F. 2d 724, (C.C.A.5—1954).

Julian Foundry Co. v. Fidelity & Casualty Co., 124 N.E.2d 48, (Ill.—1955).

Lipman Bros. v. Hartford Accident & Indemnity Co., 100 A.2d 246, (Me.—1953).

Village of Plummer v. Anchor Casualty Co., 61 N.W.2d 225, (Minn.—1953).

Hartford Accident & Indemnity Co. v. Hattiesburg Hardware Stores, 49 So.2d 813, (Miss.—1951).

Inventory Shortage Cases Decided Adversely to the Surety

New Amsterdam Cas. Co. v. W. D. Felder & Co., 214 F.2d 825, (C.C.A.5—1954).

Morrow Retail Stores v. Hartford Accident & Indemnity Co., 111 F.Supp. 772, (D.C.Idaho—1953).

American Mutual Liability Ins. Co. v. Jellico, 268 S.W.2d 429, (Ky.—1954).

National Shirt & Hat Shops of the Carolinas, Inc. v. American Motorist Insurance Co., 68 S.E.2d 824, (N.C.—1952).

Aside from the inventory shortage cases, a case of particular interest is that of the *Mortgage Corp. of N. J. v. Aetna Casualty & Surety Co.*, 115 A.2d 43, (Sup.Ct.N.J.—1955). In that case the court held that absence of any motive or personal profit or gain on part of employee does not establish that wrongful act of employee *was not* a dishonest act within meaning of fidelity bond indemnifying employer against dishonest acts of employee. The decision was a 4-to-3 one, and the dissenting opinion was a strong one, and it is recommended that both the majority and dissenting opinions be read for a complete understanding of the situation.

Another matter always of interest in the fidelity field is that of confessions. In the case of *Jacksonville Paper Co. v. Hartford Accident & Indemnity Co.*, 69 So.2d 411, (Ala.—1953), the court held that a written confession of an employee made after his discharge was inadmissible against the surety. This case is of importance to those handling the defense of fidelity matters as it perpetuates what is felt to be the proper law on the subject.

In the contract surety field, perhaps the most volatile subject is the effort of the federal government to collect taxes against the surety on a payment bond or out of contract balance, as against the right of the surety to receive the same upon making payment of labor and material obligations or completing construction work.

A very valued member of this committee, Mr. Emmett Kerrigan, of the firm of Deutsch, Kerrigan and Stiles, New Orleans,

Louisiana, will deliver a paper on this subject before the American Bar Association Convention, at the 1956 meeting in Dallas, Texas, and, no doubt, it will have been published by the time this report is submitted, or will be published shortly thereafter. Therefore, no effort will be made herein to do any more than make passing remarks in regards to the complexity and seriousness of the matter, and to refer the membership to Mr. Kerrigan's paper, which we feel certain will very fully cover the subject.

The federal government heretofore, while filing liens, seemed to place greater emphasis on recovering directly against the surety bonds. However, it changed its tactics somewhat during the past year by putting more emphasis on liens and by following through in attempts to have those liens declared prior to the right of the surety to recover contract balance. Up until recently, the decisions were generally favorable to the surety, and were highlighted by the case of *U. S. F. & G. v. Triborough Bridge Authority*, 74 N. E. 2d 226, (C.A. N.Y.—1947). However, of recent months, some of the courts have been deciding favorably to the government and have been distinguishing that case, among others. While this phase of the problem will, undoubtedly, be covered fully by Mr. Kerrigan, it is recommended that the membership could very profitably review the following decisions:

U. S. v. King County Iron Works, 224 F.2d 232, (C.A.2—1955).

Aetna Casualty & Surety Co. v. Horticultural Service, Inc., 147 N.Y.S.2d 422, (Sup.Ct.N.Y.County—1956).

U. S. v. Phoenix Indemnity & Central Indemnity Co., 231 F. 2d 573, (C.A.4—1956).

Fidelity & Deposit Co. v. New York Housing Authority, decided by the District Court for the Southern District of New York, April 18, 1956.

Also, special attention is called to the case of *U. S. v. White Bear Brewing Co.*, 227 F.2d 359, (C.A.7—1955), in which it was held that where a contractor after completion of work for corporation filed a mechanic's lien in conformity to Illinois statute prior to receipt by Collector of Internal Revenue of tax assessments against corporation, mechanic's lien which was subsequently foreclosed, had priority over federal tax lien in absence of showing of corporation's insolvency, but in connection with which there was an appeal to the Supreme Court of the United States, with that court, by a decision dated April 9, 1956 (yet unreported), having reversed the Circuit Court of Appeals.

The cases of *U. S. v. White Bear Brewing Co., Inc., supra*, and *U. S. v. Phoenix Indemnity and Century Indemnity Co., supra*, even though having been decided by appellate courts, can be distinguished from the usual case where a surety is attempting to recover contract balance and the government is attempting to recover that same balance by virtue of a tax lien. They do tend, however, to indicate a possible change in trend from the case of *U. S. F. & G. v. Triborough Bridge Authority, supra.*

The cases of *Aetna Casualty Co. v. Horticultural Service, Inc., supra*, and *Fidelity & Deposit Co. v. New York Housing Authority, supra*, are both lower court decisions on which it is understood that appeals have been taken. They both deal directly with the matter of the priority between the surety and the government. However, having been unfavorable to the surety in the lower courts, they should be watched closely on the appeals to determine whether the appellate courts will follow the decision of the *U. S. F. & G. v. Triborough Bridge Authority, supra.*

As opposed to the above decisions, which indicate a possible trend from *U. S. F. & G. v. Triborough Bridge Authority, supra*, special attention is directed to the case of *R. F. Ball Construction Co., Inc. v. Marcus M. Jacobs, et al.*, 140 F. Supp. 60, decided during the present year by the District Court of the United States for the Western District of Texas, San Antonio Division. It is favorable to the right of the surety to recover contract funds, as opposed to the government under its tax lien.

Still another item of interest in the contract surety field is the case of *Seaboard Surety Co. v. Dale Construction*, 230 F. 2d 625, (C.A.1—1956). In that case a contractor on a federal job had been declared in default by the contracting officer, but the contractor had appealed to the Board of Contract Appeals. In the interim, the Seaboard Surety Company took over and arranged for completion, and thereupon attempted to recover the contract price. The lower court held that,

inasmuch as the declaration of default was not final at the time the surety took over, and the Board of Contract Appeals thereafter had reversed the contracting officer, the surety, in taking over, was a mere volunteer and was not entitled to recover the contract funds. However, the Seaboard Surety appealed on the ground that its application permitted it to take over the completion of the job irrespective of default, when it felt it necessary and advisable to do so, and, therefore, it had a right to complete regardless of whether the declaration by the contracting officer was final or not. The appellate court on this argument reversed the lower court and remanded the case for determination as to whether the surety had acted in good faith and conscientiously felt that, in taking over the job, it was necessary for it to do so for the protection of its interests. The case is of importance to the surety industry in that those who might be faced with the problem of deciding whether to take over a job will want to determine whether a declared default is final and binding or, in the alternative, will want to determine whether the application of the surety is sufficiently broad to permit the surety to take over regardless of whether the declaration is or is not final.

The above review of what is felt to be some important subjects in the fidelity and surety field is not intended to be all inclusive, but does tend to show the trend. It is hoped that it will be of some value to the membership.

Respectfully submitted,

H. Ellsworth Miller, *Chairman;* Arthur A. Park, *Vice-Chairman;* Denman Moody, *Ex-Officio;* Newton E. Anderson, E. Cage Brewer, Jr., Edwin Cassem, J. Murray Devine, C. Hundley Gover, Newton Gresham, Josh H. Groce, R. Emmett Kerrigan, Elmer B. McCahan, Jr., Harold W. Rudolph, Herbert E. Story, Mark N. Turner, Harvey E. White.

Report of Fire and Inland Marine Committee—1956

PETER J. KORSAN, *Chairman*
Philadelphia, Pennsylvania

DURING the past year the committee's primary undertaking has been directed toward the study and review of fire and inland marine cases reported for the period April, 1955 to June, 1956. Annotations of these decisions are attached to the report of the committee as an appendix.

One of the subjects suggested in the 1955 report was the requirement which the courts have set up for a valid oral contract. This has been made the subject of an article, "The Use of Oral Binders," by John W. Neville, Associate Secretary, American Insurance Association, submitted by the committee for publication in the Insurance Counsel Journal. The committee has also made arrangements for the publication of another interesting and instructive article by T. W. Booth of the American Fore Group on "Bailee Losses."

Recent introduction of legislation in Congress concerning flood insurance and interpretation of Public Law 15, better known as the McCarran Act, by the Federal Trade Commission has raised many important questions to confront insurance counsel. The definition and interpretation of the word "flood" as used in flood insurance statutes will have considerable effect on its meaning in existing policy coverages. The latter problem raised by the Federal Trade Commission's recent investigation of practices in the accident and health insurance field is one which affects the entire industry but also merits this committee's attention and study.

Respectfully submitted,

Peter J. Korsan, *Chairman;* Thomas M. *Phillips, Vice-Chairman;* James D. Fellers, *Ex-Officio;* Leonard B. Bogart, Gordon R. Close, Vernon Coe, J. D. Cook, James E. Cooney, Arthur B. Geer, J. Woodrow Norvell, Adelbert W. Thomas, John J. Wicker.

Annotations—Fire and Inland Marine Insurance Cases

Period Covered:
Cases Reported April 1955 *to June* 1956

The following cases cover a variety of sub-headings under the title of fire and inland marine insurance. As in the previous annotations, they have been grouped together topically where possible. Where a given case contains several topics, the case has been placed under that heading which appeared to be the major issue upon which judgment was rendered. The complete factual situation of every case has not been set forth, and because of the variety of topics covered as well as variety of jurisdictions cited no rules are expounded as resulting from a given set of cases.

Agent's Authority

Tucker v. American Aviation & General Ins. Co., Reading, Pa., 8 F. & C.C. 630, 278 S. W. 2d 677 (April, 1955) Tennessee Supreme Court.

Plaintiff purchased fire insurance from C who at time policy was issued was an authorized agent of defendant. During term of the policy defendant terminated C's agent's certificate pursuant to statute by notice to the insurance commissioner. Near the end of the insurance term plaintiff went to C and had his policy renewed by paying premium, which C accepted as agent of defendant and executed a certificate. Plaintiff was unaware that C's agency had been terminated, and plaintiff's policy contained an annual renewal plan providing policy might be renewed for four years.

Defendant refused claim on a subsequent fire loss on the grounds that C was not a proper agent to sign a renewal certificate. Court held that plaintiff could not be held to have constructive notice of C's termination by the filing with the insurance commissioner and that the company was bound to give notice to all insured persons who had dealt with C that his agency had been terminated.

Anderson v. American & Foreign Ins. Co., 8 F. & C.C. 927, 86 So. 2d 303 (Mississippi Supreme Crt., March 26, 1956).

Denial of liability by insurer's agent did not relieve the insured of his duty to submit to examination as was required by the policies where it was shown that the insured subsequently executed a non-waiver agreement.

Apportionment—Fire Policy

Haug v. Old Guard Mutual Ins. Co., 4D. & C. 2d 436 (C. P. Lancaster County, Pa., May 27, 1955).

Owner of premises had 2 fire policies, each for $2,000. One had provision for extended coverage including wind damage and provision for limiting liability on loss to the same extent that the amount of insurance carried on that policy bears to the total amount of fire insurance whether or not the other fire policies cover the additional perils.

The court held that insured may only recover 50% of wind damage loss from extended coverage carrier, even though other fire policy did not contain wind damage coverage. The court also held that when court renders judgment on pleadings for company in lower amount than deposited with court under act of March 12, 1867, P. L. 35, company is not entitled to a refund because amount deposited immediately belongs to plaintiff.

Arbitration and Appraisal

Miller v. American Ins. Co., 5 Automobile cases (2d) 836 (U. S. Dist. Ct., Arkansas, Aug. 20, 1954).

Since policy was issued in Texas, the clause calling for arbitration of disputes as to the amount of loss was applicable in Arkansas where truck was burned, even though Arkansas statute prohibits arbitration clauses.

Jordan v. General Ins. Co. of America, 8 F. & C.C. 686, 88 S. E. 2d 198 (April, 1955) Georgia.

Action to recover for loss of house and furnishings and to set aside an award made by appraisers pursuant to policy provisions. Lower court sustained a general demurrer to plaintiff's complaint. Appellate court reversed holding that the petition alleging that the appraisal was unreasonable and unfair so as to amount to a fraud stated a cause of action good against a general demurrer.

Fidelity & Guaranty Insurance Corp v. Mondzelewski, 8 F. & C.C. 747, 117 A. 2d 369 (Supreme Court of Delaware, Oct. 25, 1955).

Where a structure was damaged by fire,

and building inspector of city of Wilmington condemned structure on ground that fire damage exceeded 50% of assessed value, owner or fire insurer could challenge order to determine whether damage exceeded 50% of real value.

Appraisal provisions of policy are overridden by valued policy statute and appraisers' award is not binding on insured. Also, under valued policy statute insured under fire policy did not waive his right to recover for total loss by merely consenting to an appraisal, in absence of some showing of conduct by insured misleading insurer to its detriment.

In Re Delmar Box Co., 127 N. E. 2d 808, 8 F. & C.C. 756, 309 N.Y. 60 (Ct. of Appeals of New York, 1955).

Insured applied for an order pursuant to Sec. 1450 of the Civil Practice Act to compel insurers to comply with the provision for appraisal as contained in a standard fire policy. Statute provided that submissions or contract for settlement by arbitration of controversy between parties may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, subsequent to "or independent of" an issue between the parties.

Court held the words "or independent of" added to the statute by amendment did not have the effect of altering the settled rule that determination of a fire loss by appraisal is not an arbitration proceeding.

An insured under a standard New York fire insurance policy may not compel the insurer to comply with the provisions for appraisal contained in such a policy.

Harwell v. Home Mutual Fire Ins. Co., 8 F. & C.C. 904 (South Carolina, Feb. 6, 1956).

Appraisal clause in policy held valid. Owner's refusal to arbitrate held to violate stipulation in policy that no action is sustainable unless all requirements of the policy shall have been complied with and constitutes a valid condition precedent to an action on such policy.

Caledonian Ins. Co. v. Superior Ct. of Alameda County, 8 F. & C.C. 934 (Calif., April 3, 1956).

A court could not, on motion of insured, appoint an umpire without notice having been given to the insurer, and in such a situation jurisdiction of the person of the insurer is lacking.

Arson

McSweeney v. Utica Fire Ins. Co., 8 F. & C.C. 734, 224 F. 2d 327 (U.S. Ct. of Appeals, 4th Circuit, July 9, 1955).

Company defended on grounds that fire was set by insured or her agents. Verdict and judgment for company. Court did not permit insured to show she had been acquitted of arson as in South Carolina neither a conviction nor an acquittal in a criminal court is admissible in a civil case as proof of defendant's guilt.

Edlin v. Fireman's Ins. Co., et al., 8 F. & C.C. 735; 225 F. 2d 80, (C. C. A. 7th, July 25, 1955.)

In a suit for recovery of fire loss covered by defendants' policies evidence was admissible to show that the insured had received a condemnation award prior to the loss for the purpose of showing probable existence of a motive to burn but such evidence was not relevant as manifesting the motive itself.

Mickelson v. Homeland Ins. Co., et al., 8 F. & C.C. 759; 132 F. Supp. 670 (U.S.D.C. Dist. of Minn. Third Div., July 13, 1955.)

The fact that the insured was in financial difficulty and that the fire which destroyed his business premises appeared to be of incendiary origin and from which arose a suspicion of arson was insufficient for a basis of finding of fact of arson.

Federal Ins. Co. v. Wong, 137 F. Supp. 232 (U. S. D. C., Calif., Jan. 9, 1956).

Property was jointly owned by insureds and one of them deliberately set property afire.

Held: Other joint owner cannot recover even though he did not participate in the arson.

Williams v. Cambridge Mutual Fire Ins. Co., 8 F. & C.C. 889, 230 F. 2d 293, (U. S. Court of Appeals—5th Circuit, Mississippi, Feb. 29, 1956).

Reversal of a criminal conviction of arson did not estop insurers from alleging arson as a defense in plaintiff's action to recover on policies.

Binders and Parol Contracts to Procure Insurance

Zengerle v. Commonwealth Ins. Co. of N. Y., 8 F. & C.C. 848, 292 P. 2d 1009, (New Mexico Supreme Ct., Dec. 16, 1955).

Insureds' not entitled to summary judgment for breach of an oral contract to procure insurance where there were disputed issues as to the effective date of the

policy and the breach of conditions or the waiver thereof.

Midwestern Ins. Co. v. Rapp, 8 F. & C.C. 880, 296 P. 2d 770, (Oklahoma Supreme Court, Jan. 31, 1956).

The terms of a binder, the only insurance in force at the time of the loss, could not be varied by parol evidence to show what features were customarily embodied in insurance contracts contemplated by the binder.

Wagner v. Falbe & Co., et al., 8 F. & C.C. 906, 74 N.W. 2d 742, (Wisc. Supreme Ct., Feb. 7, 1956).

If plaintiff's evidence established that defendant's agent accepted an order to procure fire insurance, plaintiff nevertheless could not recover because of her failure to prove how much insurance the agent was to obtain.

Cancellation

Boon v. Arkansas Farmers Mutual Fire Ins. Co., 8 F. & C.C. 622, 276 S. W. 2d 436, (Feb. 1955) Arkansas.

Facts: B entered into a contract to sell his farm to S. Not knowing that the property was insured, S procured insurance on the farm dwelling from defendant in whose policy B was designated mortgagee under the mortgagee clause. Subsequently, S was unable to fulfill his contract and B released him from it; S left the farm sometime in the early part of May and the premises burned on June 19. B's insurer paid him the amount of its policy and brought an action against defendant for contribution. Defendant had refunded to S the premium he had paid. Defendant contended in addition to the defense of the premises being vacant for more than 60 days, which the evidence did not substantiate, that S had no insurable interest at the time of the loss and hence that the standard mortgage clause in the policy does not apply, and that B was the sole owner and no longer a mortgagee.

Judgment was for the plaintiff, the court holding that since no notice of cancellation was given to mortgagee, the policy was in full force as to B even though he had become sole owner before the fire.

Home Ins. Co. v. Exchange National Bank et al., 8 F. & C.C. 654; U.S.D.C. for No. Dist. of Ill. Eastern Div. March 3, 1955.

Notice of cancellation by insurer to insured is effective five (5) days after receipt thereof and the fact that the insured did not have five (5) business days from receipt thereof to procure other insurance did not render the notice ineffectual.

Farmers Mutual Hail Insurance Co. of Mo. v. Minton, 8 F. & C.C. 659; 279 S. W. 2d 48 (May 2, 1955) Missouri.

Defendant signed an application and was issued a policy of hail insurance for a five-year term. He paid the premiums assessed for two years and at the time wrote on the bottom of the assessment notice that he wished to cancel the policy for the remaining three-year term. Plaintiff brought action to recover assessments contending defendant had not properly cancelled his policy in accordance with plaintiff's by-laws which required surrender of the policy or filing a lost policy statement. Court held that defendant's liability continued and was liable for the assessments.

Esther Williams et al., v. Republic Ins. Co., 141 N.Y.S. 870; June 20, 1955.

Where the insurer has cancelled a fire policy prior to a loss by mailing notice of cancellation to the insured, the burden of proof is on the insured plaintiff to show that the agent who told her "to forget about it", meaning the notice of cancellation, had authority to countermand the cancellation. The mere fact that the agent had authority to issue policies and collect premiums does not show the authority to countermand the cancellation.

Sun Insurance Office, Ltd. v. Gonce, 8 F. & C.C. 719; 224 F. 2d 250, C.C.A. 9th, June 24, 1955.

Where insured's predecessors in title had defaulted in premium payments and the policy was cancelled and subsequently the policy was reissued to the present insured by attaching an endorsement thereto transferring the policy to him, a loss suffered subsequently was covered thereby and the consent of the original insureds was not needed to effect this transfer of coverage from one insured to another. The original insured's interest in the policy was ended when the policy was cancelled and the parties here, in effect, entered into a new contract.

Allstate Insurance Co. v. Culver, 117 A. 2d 330 (Supreme Court of New Hampshire, Oct. 24, 1955).

Where insurer's agent, who had notice of fact that insured had been involved in accident after policy had lapsed for non-

payment of premium but before insured mailed premium to insurer did not have duty to communicate such information to insurer, insurer was not chargeable with agent's knowledge, and, therefore, finding that insurer had reinstated policy without knowledge of accident was proper.

Western Millers Mutual Ins. Co. v. Williams, 8 F. & C.C. 939, 231 F. 2d 425 (U.S.C.A.—5th, Texas, April 12, 1956).

Evidence warranted recovery on ground of agent's apparent authority to revoke cancellation notice. Cancellation of policy because of non-payment on deferred premium note was given no effect because of reinstatement of prior cancellation under similar circumstances. Court said that insured is entitled to assume that an insurance agent is continuing to act within the scope of his agency, unless and until he has either actual or constructive notice to the contrary.

Concealment and Misrepresentation

Wearever Upholstering and Furniture Corporation v. Home Insurance Company, etc., 141 N.Y.S. Sec. 107, May 24, 1955.

In a suit to recover under fire policies the mere fact of shattering cross-examination of plaintiff's precedent on the grounds of fraud and false swearing were not sufficient for a directed verdict in defendant's favor but that issue was one for the jury. *Baldwin v. Bankers & Shippers Ins. Co. of N. Y.,* 8 F. & C.C. 714, 222 F. 2d 953, C.C.A. 9th, May 26, 1955.

Where insurer introduced evidence that the stock, on which a claim as a result of a fire was based, was sold in almost its entirety more than two years before the fire, a finding that the insured materially misrepresented the amount of the loss was warranted and the policy was avoided by fraud.

Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 8 F. & C.C. 827, 145 N.Y. S. 2d 206, (Supreme Ct. 1955).

Insured's action on fire policies. Company's motion for summary judgment granted. Under standard fire policy provision voiding policies for wilful concealment or misrepresentation, and provision requiring insured making claim to submit to examinations under oath and produce records and documents, questions and documents legitimately tending to prove the bona fides of out-of-sight claims previously made by insured were material to investigation of payment of claims, even after insured had withdrawn claims for out-of-sight claims.

Standard Ins. Co. of N.Y. v. Anderson, 8 F. & C.C. 924, 86 So. 2d 298 (Mississippi Supreme Court, March 26, 1956).

Failure of insured to submit to examination under oath as to all matters material to the adjustment of his loss barred his right to recover.

Declaratory Judgment

National-Ben Franklin Fire Ins. Co. v. Camden Trust Co., 120 A. 2d 754 (Supreme Ct. of New Jersey, Feb. 20, 1956).

Interests of justice require that court entertain action by two insurers against trustee under mortgage indenture for declaratory judgment as to whether or not insurers had status of bondholders under prior judgment entitling insurers to receive an assignment of interest in bond and mortgage.

Under former holding insurers admitted their rights were "junior in lien and right of collection" but contended they still had the status and rights of bondholders. One of the mortgagees refused to recognize that they had any rights.

Expired and Lapsed Policies

Borders v. Southern General Ins. Co. of Atlanta, 8 F. & C.C. 855, 91 S.E. 2d 87, (Ga. Ct. of Appeals, Nov. 23, 1955).

Court stated there was evidence from which jury could have found that plaintiff paid premium month before loss and loss occurred during 30-day grace period provided in policy.

Randall v. Northern Ins. Co. of New York, 8 F. & C.C. 819, (Tennessee Court of Appeals, Nov. 4, 1955).

Overwhelming weight of the evidence showed that the policy lapsed according to its own provisions before the loss occurred because the insured expressly rejected an extension agreement.

Explosion, Boiler and Oil Well Insurance Fidelity-Phenix Fire Ins. Co. of N. Y. v. Dyer, 8 F. & C.C. 657, 220 F. 2d 697, C. C. A. 5th, (April 6, 1955) Louisiana.

Court affirmed judgment for plaintiff in lower court and held that the evidence was sufficient to sustain a finding that a "blowout" rather than a "kick" had caused the loss. The court did not attempt to define these terms, but stated that "blowout" itself (as distinguished

from other causes) must result in the impossibility, as a practical matter, of controlling the drilling operation but not *complete* lack of control as urged by the company.

Pilsen Laundry Dry Cleaning Co. v. American Employers' Ins. Co., 8 F. & C.C. 670, 123 N. E. 2d 121, (Jan. 4, 1955) Illinois.

The court held that plaintiff's evidence reasonably established that its boiler was damaged within the coverage of the policy because of a sudden accidental burning which resulted from a deficiency of water within the boiler.

Hulcher Soya Products, Inc. v. Millers' Mutual Fire Ins. Assn., et al., 8 F. & C.C. 690, 124 N. E. 2d 570 (Feb. 1955) Illinois Appellate Court.

Action for damages to grain elevator allegedly caused by explosion. Plaintiff's evidence indicated that the entire north wall of the elevator was forced out and there was considerable noise. Plaintiff's expert testified that in his opinion an explosion had occurred because of an expansion of the contents of the elevator, but he was unable to testify as to what caused the explosion. Company contended there was a structural failure because of the stress created by a large quantity of wheat. Court held that there was no evidence of the sudden development of an internal force or a sudden or rapid expansion of air. Judgment for plaintiff reversed.

Wisconsin Hydro Electric Co. v. Equitable Fire & Marine Ins. Co., 8 F. & C.C. 632, 129 F. Supp. 762, (March 1955) U. S. D. C. Minnesota.

Plaintiff settled a claim against it because of the explosion of a gas water heater one of its employees was servicing on property not maintained, owned, leased or controlled by plaintiff and brought action against company contending the loss was covered by a policy issued by company. Court held that since liability for losses caused by "business operations" was clearly limited to premises specifically described, company was not liable.

Texas City Terminal Ry. Co. v. American Equitable Assurance Co. of New York et al., 8 F. & C. C. 782 (U. S. Dist. Ct., S. D. of Texas, 1955).

Although fire initially caused explosions, a railway's facilities were covered by an explosion policy which insured against all direct loss and damage caused by explosion whether originating on the insured premises or elsewhere.

Julius Hyman & Co. v. American Motorists Ins. Co., 136 F. Supp. 830 (U.S. Dist. Court, Colorado, Dec. 28, 1955).

Action on boiler and machinery insurance policy. *Held*: Evidence established that a break in a pipe in a Dowtherm boiler was the result of an "accident" within the coverage of the policy but was not an "explosion" within fire policies covering same boiler. Judgment for insured.

Feeney v. Empire State Ins. Co., 8 F. & C.C. 871, 228 F. 2d 770 (U. S. Ct. of Appeals—10th Circuit, Oklahoma, Dec. 27, 1955).

Action on policy to recover for loss of certain oil well drilling equipment destroyed by fire. Defendant claimed loss was proximately caused by a "blowout", a type of loss specifically excluded. Clause in policy stated "policy does not cover loss or damage caused by a Blowout or Cratering of an oil or gas well".

Dispute was whether "blowout" was prior to or subsequent to a "fire".

Held: The policy in general terms and without exception covered loss resulting from fire. If defendant intended to exclude loss from fire caused by "blowout", it should have stated so by such a provision in the policy.

Court stated it would assume there was a "blowout" and it was the cause of the ensuing fire. Nonetheless, there was liability under the policy. The clause in the policy must be strictly construed and would apply to free company from liability in the case where damage is caused by a "blowout" with no fire. Company could have avoided liability by a clause "loss or damage caused by a 'blowout' or fire resulting from a 'blowout'." Court said problem was not to consider proximate cause.

Increase of Hazard

Farmers Fire Ins. Co. v. Farris, 8 F. & C.C. 608 (March, 1955), Arkansas.

Whether conduct of tenant, in leaving a table, wood heater, icebox, chair and certain tools in the house, ten head or more of cattle in the pasture; some salt and hay in the barn; and in being regularly on the premises at least once a day but who ate and slept elsewhere, constituted occupancy within the fire policy was held

to be a question of fact for the jury.

The policy was on a farm dwelling and barn; the court held that occupancy of the dwelling determines the status of the barn, rather than the occupancy of the barn determining the status of the dwelling.

American Indemnity Co. v. Newson et al., 8 F. & C.C. 645, 79 So. 2d 392, Louisiana Court of Appeals, Second Circuit, March 22, 1955.

Where an insurer's agent issued a policy covering a building which he knew had been vacant for a period of more than four months, and such vacancy was not shown by the evidence to have increased the moral or physical hazard of fire, the insurer cannot escape liability in the event of a loss by fire on the grounds of 60 days vacancy without notice to the insurer under a statute permitting a policy to be declared void for breach of a condition which increases the moral or physical hazard insured against.

American Indemnity Co. v. Newson et al., 8 F. & C.C. 645, 79 So. 2d 392 (April 14, 1955) Louisiana.

Court held that under Louisiana statute a policy could not be declared void for breach of a condition (premises vacant for over 60 days) unless the moral or physical hazard of a fire was increased because of the breach.

Also, company's agent issued the policy knowing that the building had been vacant for a period of more than four months. *Nemojeski v. Bubolz Mutual Town Fire Ins. Co.*, 8 F. & C.C. 878, 74 N.W. 2d 196, Wisconsin Supreme Ct., January 10, 1956.

Whether the subsequent execution of a mortgage on the insured property without notice to the insurer had the effect of increasing the hazard presented a question of fact to be determined in view of the circumstances of the case.

Interest on Proceeds

U. S. v. McDonald Grain & Seed Co., 135 F. Supp. 854, (U. S. Dist. Ct., North Dakota, November 18, 1955).

Company, which insured 2 of the defendants against fire, moved for permission to deposit in court the amount of its admitted liability, with interest, and to dismiss it as party defendant.

Held: Having voluntarily retained proceeds of its policy as a stakeholder for 7 months, while conflicting claims were being asserted thereto in court, and for nearly same time after filing notice of motion to deposit money in court, without diligent effort to have motion heard, company was obligated by state statute to pay interest at rate prescribed thereby on such amount from date on which it became due under state law, though there was no express contract requiring payment of interest.

Jewel-Fur Floater

Ferdinand v. Agricultural Ins. Co. of Watertown, N. Y., 8 F. & C.C. 930, 122 A. 2d 1, (Superior Ct. of N. J., April 2, 1956).

Action on jewelry-fur floater policy to recover loss of 7 pieces of jewelry which were allegedly stolen. Directed verdict for insureds after insurer rested without offering testimony at close of insured's case. Affirmed. Jewelry disappeared under circumstances indicating a felonious abstraction. No facts from which jury could draw inference that claim was fabrication or theft occurred through prearrangement.

Miscellaneous Policy Provisions

ACTUAL CASH VALUE

Lazaroff v. Northwestern National Ins. Co. of Milwaukee, Wis., 8 F. & C.C. 892, (N. Y. Supreme Ct., June 5, 1952).

Although not in accord with judicial criteria for the ascertainment of actual cash value, the extent of coverage under the policy, the parties could stipulate that the actual cash value was the replacement cost less depreciation.

ADDITIONAL INSURANCE PROHIBITION

Hunter v. U. S. Fidelity & Guaranty Co., 8 F. & C.C. 921, 86 So. 2d 421, (Florida Supreme Court, March 28, 1956).

Insureds barred from action on policy to recover for fire loss because of additional insurance obtained in violation of policy provision.

EXTENDED COVERAGE

Stephanie v. Consumers Mutual Ins. Co., 8 F. & C.C. 873, 74 N. W. 2d 116. (Minnesota Supreme Court, Dec. 23, 1955).

Evidence that the asphalt and paper covering of the roof of plaintiff's trailer was perforated by hail stones, thus permitting water to seep into the interior thereof through plywood thereon, was sufficient

to sustain a verdict for plaintiff under the "extended coverage" provisions of a fire policy.

REPORTING FORM EXCESS INSURANCE POLICY—VALIDITY OF AN ACCORD AND SATISFACTION

Empire Industries, Inc. v. Northern Assurance Co., 8 F. & C.C. 840 (Mich. Supreme Ct., June 6, 1955).

An accord and satisfaction which compromised a disputed claim under a policy was not invalid under the Michigan Coinsurance statute as an agreement limiting the insurer's liability by reason of the insured's failure to fully insure.

RIGHT TO REBUILD

Gowan v. Homestead Mutual Ins. Co., 8 F. & C.C. 879, 74 N. W. 2d 634, (Wisconsin Supreme Ct., Feb. 7, 1956).

An attached barn, barn basement and silo, although valued separately, constituted a single instrumentality, and an insurer could not exercise its right to rebuild unless it undertook to rebuild all the structures in their entirety.

VANDALISM & MALICIOUS MISCHIEF ENDORSEMENTS

Liberty National Bank of Chicago v. Centennial Ins. Co., 8 F. & C.C. 846, (U. S. Dist. Ct., Ill., Nov. 23, 1955).

Evidence indicating that insured property was damaged by some 75 to 150 persons who entered the insured premises, that those participating in the incident used only that force and violence necessary to cause the damage, and that there was no force or violence exhibited against any person at any time entitled plaintiff to recover a portion of its loss under the vandalism and malicious mischief endorsements of several of its fire policies.

Parol Evidence

Pomeroy v. Cimarron Ins. Co., Inc., 8 F. & C.C. 725, 129 F. Supp. 35, U.S.D.C. for Western District of Oklahoma, Feb. 24, 1955.

Where the insurer issued a policy on "all contents" it could not defend an action thereon by claiming that when the policy was delivered, it was intended to cover only new draperies and new seats to be purchased by the insured for that would be varying the terms of the written contract. However, in this case extrinsic evidence was allowed to show when the policy was to go into effect in the event that a condition precedent to the insurance going into effect was claimed and if proved that such did not take place, then there would be no contract entered into by the parties.

Proof of Loss

Moyer v. Merchants Fire Ins. Co., 133 N. E. 2d 790, (Ct. of C. P., Ohio, Franklin County, May 14, 1952).

Insured's failure to properly notify insurer that loss occurred and not filing proof of loss within time specified by the policy barred recovery.

In Ohio—Provisions of written notice cannot be waived by the agent who had no specific authority to do so.

William v. Bankers Fire & Marine Ins. Co., 8 F. & C.C. 634, 277 S. W. 2d 742 (March 1955) Texas.

Action on fire insurance policy for loss of house trailer destroyed by fire. Defense —arson and failure to file proof of loss. Court found sufficient evidence of arson and held that company did not waive policy requirement for proof of loss by the fact that its adjuster knew plaintiff was in jail and unable to file proof while so confined. Judgment for company.

Brindley et al., v. Firemen's Insurance Co. of Newark, N. J. et al., 8 F. & C. C. 650, 113 A. 2d 53, (March 1955) New Jersey.

Plaintiffs brought action to recover on a fire insurance policy under an extended coverage endorsement which insured against loss because of windstorm. Court held that plaintiff's evidence failed to show that damage was caused by direct action of the wind. Also it is not enough to show that loss may have been due to one or more causes for only one of which the insurer would be liable. Plaintiffs would have been entitled to recover for some of the loss but were precluded by failure to file proofs of loss within a 60-day period.

Bradshaw et al., v. Consolidated Underwriters of the S. C. Ins. Co., et al., 8 F. & C.C. 671, U.S.D.C. (May 13, 1955) Arkansas.

The Court held the fire was of incendiary origin, but there was no proof that plaintiffs burned the building or caused it to be burned; also, plaintiff's failure to file proofs of loss within the sixty-day period provided in the policies was not fatal to

their action. The conduct of company's adjuster was inconsistent with an intention to enforce strict compliance with the terms of the policies, and company was aware shortly after the fire of the amount of claims being asserted.

Fraylon v. Royal Exchange Assurance, 131 F. Supp. 676, (U.S. Dist. Ct., North Carolina, May 31, 1955); Affirmed 8 F. & C.C. 852, 229 F. 2d 351, C.C.A.—4th, Dec. 16, 1955.

Action to recover proceeds of fire policy. Court held that where house was insured for $18,500, and had an actual cash value of $14,000, proof of loss for $23,000 filed by insured did not constitute such a false claim as would destroy insured's right to recover. Court found that proof of loss was not knowingly false nor fradulent.

Renner v. Firemen's Ins. Co. of Newark, N. J., 136 F. Supp. 114 (U. S. Dist. Court, Tenn., Oct. 6, 1955).

Forfeiture of policy not justified on the ground that there was a breach of a condition subsequent by the insured in that they made misrepresentations as to the loss, as to what they paid for the property destroyed, and with respect to the parties from whom they purchased it.

Reformation

Home Ins. Co. v. Tanner, 8 F. & C.C. 616, 220 F. 2d 41, C.C.A.—5th, (March, 1955) Georgia.

Suit to reform fire insurance policy. Plaintiff carried a monthly reporting form of fire insurance to cover fluctuating inventories. He asked defendant's agent to increase the limit of the policy from $10,500 to $25,000, but because of agent's negligent failure to make an endorsement on the policy, plaintiff's coverage on a loss was only $10,500 (value of property destroyed was in excess of $29,000).

Lower court held that plaintiff could not have policy reformed for unilateral mistake of fact, but did have a cause of action in tort because of the agent's negligence. Appellate court reversed holding that a breach of a parol agreement to make a new contract of fire insurance by attaching an endorsement increasing the limits of liability does not give rise to an actionable claim in tort. The court's ratonale was that since it is impossible to make a valid parol contract of fire insurance in Georgia, it is untenable to hold that breach of such a contract gives rise to a cause of action. The court refused to recognize a distinction between an oral contract *of* insurance and an oral contract *for* insurance.

McKay Corp. v. The Home Ins. Co., 8 F. & C.C. 777, 130 F. Supp. 633, May 6, 1955.

Reformation of a fire policy, after a loss was sustained, was refused as to the loss suffered by insured to his own property, as was recovery requested after the reformation, where the evidence showed that the insured knew for many months prior to the loss that the policy covered only property of a third person in the custody of the insured and not the property of the insured.

Howard Foundry Co. v. Hartford Fire Ins. Co., et al., 8 F. & C.C. 705, 222 F. 2d 767, C. C. A.—7th, May 16, 1955.

The insured owned various farms, the buildings of at least two of them were in sections 15 and 22 of McHenry County, Illinois. The insured sustained a loss on farm buildings located in section 22 but the policy covered buildings located in section 15. The court held that there was no coverage and that there could be no reformation of the policy on the basis that the policy sufficiently identified the property located in section 22. There was no ambiguity as to the physical location of the property covered by the policy and therefore beyond the province of the jury to reform the policy.

Providence Washington Ins. Co. v. Rabinowitz, 8 F. & C.C. 844 (U.S. CA-5, Florida, Nov. 18, 1955).

If a false answer to a question in the proposal for the policy constituted a breach of warranty, plaintiffs were entitled to reformation since it was shown that the insurer's agent answered the question for plaintiffs without having any idea what it meant.

Center St. Fuel Co. v. Hanover Fire Ins. Co., 8 F. & C.C. 902, 75 N.W. 2d 462 (Wisc. Sup. Ct., March 6, 1956).

Where it was certain that insurer never intended to include the damaged pump house within the coverage of the policy, a decree of reformation because of mutual mistake and a judgment on the policy as reformed could not be sustained.

Release

Continental Ins. Co. v. Dunne, 226 F. 2d 471, (U. S. Ct. of Appeals, 9th Circuit, California, 1955).

Where insured has several of insurer's policies on same structures which are damaged by fire and insurer's checks for payment under one of the policies which is less than total loss contains printed endorsement providing that insurer is released and forever discharged by reason of loss described on face of check which describes the one policy only, release does not bar action on other policy.

Right to Proceeds

Travelers Fire Ins. Co. et al., v. Steinman, 8 F. & C.C. 655, 276 S. W. 2d 849, (March 4, 1955) **Texas.**

Plaintiff was co-owner of a building with company's insured and had an agreement that in event of loss by fire any insurance collected would belong one-half to each. The buildings were totally destroyed by fire, and when the company learned that insured was a one-half owner they paid him only one-half of the proceeds. Plaintiff was not named as an insured in the policies and brought action against the company to recover his share of the proceeds. The appellate court reversed a judgment for plaintiff in the lower court and held that plaintiff, as a stranger to the insurance contracts, could not collect simply because he was the owner of an undivided interest in the property.

Insurance Co. of N. A. v. Putney, 136 F. Supp. 894 (U.S. Dist. Court, Va., Oct. 12, 1955).

Where consignor was entitled to recover insurance on consigned articles to the extent of his interest, government, which had tax lien against consignee's property, could recover insurance proceeds on destroyed property only to extent of consignee's interest therein.

Consolidated Underwriters of S. C. Ins. Co. v. Bradshaw, 136 F. Supp. 395, 8 F. & C.C. 671, (U. S. Dist. Court, Arkansas, Dec. 7, 1955).

Standard mortgagee clause in policy. Mortgagor brought action to recover for fire loss. *Held*: Mortgagee's claim to recovery was superior to all other claims including a lien of mortgagor's attorneys.

Statute of Limitations—Policy Limitations

Parker v. Central Manufacturers Mutual Ins. Co., 128 N. E. 2d 440, (Ct. of Appeals of Ohio, July 15, 1953).

Action by insured to recover on fire policy instituted after expiration of time for commencement of action.

Held: Judgment for company affirmed. Where insured as co-defendant with insurer in previous action filed an answer denying the plaintiff's allegation of ownership of damaged buildings and of insured's wrongful claim to policy proceeds and such action was dismissed without prejudice, insured's answer was not a claim against insurer by way of cross-petition within meaning of statute allowing another action based on same claim to be commenced within one year of dismissal of any action, including any claim of defendant, which was dismissed for reasons other than on its merits after expiration of time for commencement of action, and insured's subsequent action against insurer to recover under policy was barred by statute of limitations.

Howard v. Continental Ins. Co., 4 D. & C. 2d 490, Pa., (Phila. County, Aug. 5, 1954).

Where complaint is filed against insurance company within twelves months and returned "not found", and then over a year later it is reinstated and served, service is valid even though the policy contains a provision that an action for loss must be brought within one year. Since the policy is silent on reinstatement, Pa. R. C. P. 1010 need not be interpreted to apply a twelve-month limitation on reinstatement and the statutory period governs limitations on reinstatement and reissuance.

Guarantee Trust and Safe Deposit Co. v. Home Mutual Fire Ins. Co. of Broome County, N. Y., 8 F. & C.C. 837, 117 A. 2d 824, (Pa. Superior Ct., Nov. 16, 1955).

Owners of mortgaged property obtained insurance and a standard mortgage clause was attached to the policies. Fire destroyed premises in 1942 and suit was brought by insured within a year thereafter; after protracted litigation judgment was finally recovered by insureds in 1949 which judgment was paid to insureds. No part was ever received by mortgagee. Mortgagee brought suit in 1950 to recover amount due it on the *date* the fire loss was *paid*. Company contended mortgagee was barred

because of its failure to commence suit within six years after cause of action arose and also because terms of policy provided that any action on the policy must be commenced within twelve months next after the fire.

Held: For mortgagee. Action was not an attempt to recover as mortgagee under the policies but was based on defendant's failure to recognize its obligation under the mortgage clause. Disposition of any proceeds was governed by the mortgage clause, and a violation of the express provisions of that clause requiring payment to mortgagee entitled it to judgment. Action not barred by 6-year statute of limitations since breach of the mortgage clause did not occur until insurer disregarded the provisions of that clause, and a cause of action arose at that time.

Springfield Fire & Marine Ins. Co. v. Biggs, 8 F. & C.C. 928, 295 P. 2d 790, (Oklahoma Supreme Court, April 3, 1956).

12-month period of limitations of a standard fire policy was applicable to a windstorm and hail endorsement issued in connection with such policy.

Subrogation

Rosenfeld v. Continental Building Operating Co., 135 F. Supp. 465, (U. S. Dist. Ct., Mo., Nov. 9, 1955).

Action by bailee and employee of insured against Missouri hotel for loss of insured's diamonds that were stolen from bailee's hotel room.

Held: Where insurance policy did not provide for settlement of loss by loan to insured and insurer paid amount of loss upon insured's execution of receipt that acknowledged that payment was a loan to be repaid only from any recovery on account of such loss, insurer and not bailee was the proper party to bring the action.

Hardware Mutual Ins. Co. of Minn. v. C. A. Snyder, Inc., 137 F. Supp. 812, (U. S. D.C., Pa., Jan. 4, 1956).

Subrogation action to recover from lessee of premises loss paid by insurance company for damage by fire allegedly caused by lessee's negligence.

Held: Where lease provided that any damage to building during term of lease should be paid by lessee on expiration of lease with exception of reasonable wear and tear and accident by fire, under Pennsylvania law the word "accident" as used in lease included loss by fire even though it occurred through negligence of lessee but did not include loss caused by same fire to lessor's property not leased.

Valued Policy

Southland County Mutual Ins. Co. v. Denson, 8 F. & C.C. 636, 276 S. W. 2d 562, (April, 1955) Texas.

Evidence showed plaintiff's property was totally destroyed by fire and statute provided that a fire insurance policy in such circumstances shall be held to be a liquidated demand against company for the full amount of the policy. Company contended that lower court erred in refusing to permit it to cross-examine plaintiff's witnesses about the reasonable cash value of the property. Court held that as a county mutual insurance company it might have provided in its by-laws that the particular statute was inapplicable, but its failure to so provide precluded cross-examination of plaintiff's witnesses relative to reasonable value of premises destroyed.

Hunt et al., v. General Insurance Co. of America, 8 F. & C.C. 663, 87 S. E. 2d 34, (April 19, 1955) South Carolina.

B conveyed an estate for the life of the grantor to her grandchildren plaintiffs in this action. B retained a remainder interest. Plaintiffs procured a valued fire insurance policy for $8,000 covering their interest in the property, and B later insured her remainder interest for $3,000. Fire damaged the residence in the amount of $1,290 and B recovered judgment for $922, the value of her reversionary interest. In this action the company contended that plaintiff's recovery should be limited to the value of their interest in the policy since they sued on an "interest policy". Lower court found for plaintiffs for the full amount of the loss.

Appellate court affirmed lower court and held that since the company had issued two policies on the same property with knowledge of plaintiffs' interest in the property, the Valued Policy Statute provisions regarding pro-rating were inapplicable. Company was estopped to deny liability where it accepted the risk and received premiums with full knowledge that the amount named in the policy grossly overstated plaintiff's interest.

Tedford v. Security State Fire Ins. Co., 8 F. & C.C. 680, 278 S. W. 2d 89, (April 15, 1955) Arkansas.

Plaintiff owned an undivided one-eleventh interest in the estate of his deceased father which consisted of land upon which plaintiff resided and had built a barn which company insured for $2,000. Company's agent inspected the property before the issuance of insurance and was informed at that time of plaintiff's interest, but the agent listed plaintiff as the sole owner in the application. Barn was totally destroyed, and lower court held that plaintiff was entitled to recover one-eleventh of the face amount of the policy giving effect to a provision in the policy which purported to limit the amount of recovery to insured's interest in the property. Appellate court reversed and held that under the Valued Policy Statute in the case of a total loss a fire insurance policy is held to be a liquidated demand for the full amount stated in the policy. The statute becomes a part of every policy of insurance on real property and policy stipulations in conflict with the statute are void. Court awarded $2,000 to plaintiff holding that the statute providing for payment of penalty and attorney's fees was inapplicable to farmers mutual aid associations.

Naiman v. Niagara Fire Ins. Co., 8 F. & C.C. 688, (May, 1955) New York Supreme Ct., Appellate Division.

Plaintiff insured 17 items of jewelry and 6 items of fur for $51,650. Attached to the policy was a schedule describing the items and allocating a specified amount to the aggregate insurance for each article. Action brought for theft of jewelry insured for a total amount of $40,500. The court held that the policy was an "open" policy since there was nothing in the policy fixing absolutely the value of the subject insured at the amount insured; therefore plaintiff's recovery was limited to the market value at the time of the loss.

Fidelity & Guaranty Ins. Corp. et al., v. Mondzelewski, 8 F. & C.C. 747, 115 A. 2d 697, Delaware Supreme Court, July 7, 1955.

Where insured suffered a $1,550 fire loss to a building with a value of $8,255 but which was assessed at $600 and there was an applicable ordinance that provided that where there was damage in excess of 50% of the assessed value the property upon being restored must conform to building codes applicable which in this case provided that frame buildings could not be restored as frame, the insured was not permitted to recover the full $7,000 insurance for a constructive total loss due to the fact that the question of the constitutionality of the assessment figures was not argued in the lower court as it should have been, for if such were unconstitutional, there would be a deprivation from property owner of the right to make minor repairs to his property.

Boyd Holden v. Hanover Fire Ins. Co., 128 F. Supp. 527, U.S.C.D., W.D. So. Car., Feb. 4, 1955.

Where insured, before execution of policy informed fire insurance agent that he had only a limited interest in realty and told agent to discover extent of interest and policy was executed for amount suggested by agent, insurer could not contend, when confronted with a total loss claim, that insured's interest was less than face value of valued fire policy.

Vendor-Vendee-Insurable Interest

Insurance Co. of North America v. Alberstadt, 8 F. & C.C. 916, 119 A. 2d 83, Supreme Ct. of Pa. (Jan. 6, 1956).

Where, following a sheriff's sale of property and before the legal title was transferred, property was damaged by fire, the insurance which the legal title owner could collect under a policy he held belonged to the purchaser as against the holder of the legal title where there was no evidence that the latter's right of redemption had any value; in such case the purchaser could not recover the amount of a separate policy issued to him by another insurance company. Liabilities of the companies were prorated in accordance with terms of the policies.

Compare with *Vogel, et al., v. Northern Assurance Co. Ltd. et al.*, 8 F. & C.C. 592; C.C.A. (3rd); February 17, 1955, 219 F. 2d 409.

Dean v. Pioneer Co-operative Fire Ins. Co., 8 F. & C.C. 945, 231 F. 2d 18 (U.S.C.A.-5th, Texas, March 16, 1956).

Where vendor of property, who retained vendor's lien and whose purchaser was in substantial default, acquired full insurance under a Texas standard fire policy, and insurer had full knowledge of facts,

and purchaser abandoned property to vendor before loss vendor was entitled to recover full amount of policy, and was *not* limited to amount of vendor's lien.

Vendor had disclosed facts to D's solicitor, except the change to a leasehold between vendor and purchaser.

Foxbilt Inc. v. Citizens Ins. Co. of New Jersey, 8 F. & C.C. 772, 128 F. Supp. 594, U.S.D.C., S.O. Iowa, Jan. 17, 1955. Affirmed on appeal. See 8 F. & C.C. 815, 226 F. 2d 641, C.C.A. 8th, Nov. 4, 1955.

Where insured, who had improved premises leased by him from landlord, obtained fire insurance on such improvements which provided the insurer would treat insured as sole and unconditional owner in the event of fire and the improvements were subsequently damaged by fire, the insured was permitted to recover for such damages from the insurer even though the damage to the improvements were repaired by the landlord at no cost to the insured.

This case is distinguishable from the Vogel case in that here the insured suffered a loss for which he was entitled to compensation and the damages were voluntarily repaired by a third party not a party to the contract of insurance.

National Farmers Union Property & Casualty Co. v. Thompson, 8 F. & C.C. 722, 286 P. 2d 249, Utah Supreme Court, July 12, 1955.

Where insured sold a building covered under a fire policy issued in his name but retained possession of the building for the purpose of storing machinery therein, for which he had an agreement with the owner, a fire loss to the building would be covered by the policy and could not be defeated on the basis of lack of insurable interest particularly where, as here, the insurer knew of the above facts.

Waiver

Bright v. Calvert Fire Ins. Co., 128 N. E. 2d 152, (Ct. of Appeals of Ohio, Oct. 22, 1954).

Where, under the terms of a chattel mortgage on a motor vehicle, the "mortgagee . . . is authorized to purchase any and all such insurance at the mortgagor's expense," and a policy of insurance is procured by mortgagee, the premium computed by the mortgagee, added to the amount of the loan and eventually paid by the mortgagor, with the mortgagee making the payment to the insurer, and where such insurance policy names the mortgagee as one of the insured parties, such mortgagee is not an agent of the insurer with authority to bind the insurance company under Section 644, General Code. Therefore, mortgagee could not bind insurance company to a waiver of limitation in policy restricting operation of truck to a 50-mile radius.

Warranties

Dworsky, et al., v. Vermes Credit Jewelry, Inc., 8 F. & C.C. 604, 69 N. W. 2d 118, (Feb. 1955) Minnesota.

Insured sued insurance company in the federal courts for fire loss under a Jewelers' Block Policy; company had refused payment on the grounds that insured had violated the warranty in its policy to keep 60% of its jewelry by value in a safe or vault when premises were closed. Judgment was for insured, the court holding that the warranty was invalid under the Minnesota standard fire policy.

In this action plaintiff, company's agent, sued insured to recover the balance of the unpaid premium due on the policy. The court held that the invalidity of one of the terms of the policy did not invalidate the entire policy and relieve insured of its liability for the premiums.

Hanover Fire Insurance Co. v. Holcombe, 233 F. 2d 844, (U. S. Ct. of Appeals—5th Circuit, June 21, 1955).

Action on policy insuring plaintiff's vessel against loss by fire. Defense-vessel was unseaworty at time of commencement of voyage which violated express warranty of seaworthiness contained in the policy; vessel only had three men in crew and therefore insufficiently manned for voyage from Miami to Panama Canal. Plaintiff offered opinion testimony of three expert witnesses who expressed view that vessel was properly manned, who made some damaging admissions, one of which being from one witness admitting he knew of no vessel of the type in question which had sailed out of Miami with a crew of only three men. Defendant's five expert witnesses testified vessel was insufficiently manned and therefore unseaworthy. In no other voyage had the vessel sailed with only three men.

Court affirmed lower court's (non-jury) judgment for plaintiff holding that defendant has burden of proving vessel unseaworthy as every vessel is presumed to be seaworthy. It is a question of fact and defendant insurer failed to carry burden of its defense (so said lower court). Appellate court said they wouldn't interfere as would be assuming jury's province and judicially relying on court's own skill in maritime affairs.

Comment: See dissenting opinion.

Water Damage

Fine, et al., v. Underwriters of Lloyd's London, et al., 8 F. & C.C. 948, U.S.D.C., Pa. (April 4, 1956).

Action to recover on a water damage policy. The damage was caused because of a leak in a toilet in a building adjoining plaintiff's premises; the water seeped through the walls or foundation of plaintiff's property. Court held it was bound by precedent and found for company because of provision in the policy that the company was not liable for loss by water damage "caused directly or indirectly by: (a) seepage, leakage or influx of water through building walls, foundations . . ."

Windstorm

Aetna Ins. Co. v. Owens, 8 F. & C.C. 648, (March, 1955) Arkansas.

Evidence was held to be sufficient to establish that plaintiff's loss through destruction of his TV antenna was by windstorm and not due to the combined effects of wind, snow and ice.

Wood v. Michigan Millers Fire Ins. Co., 8 F. & C.C. 842, 90 S. E. 2d 310, (North Carolina Supreme Court, 1955).

Opinion of lay witnesses, who visited the damaged premises after the hurricane, that the damage was caused by windstorm should not have been admitted as it invaded the province of the jury.

Freyberg v. London & Scottish Assurance Corp., 8 F. & C.C. 910, 75 N. W. 2d 203, (Minnesota Supreme Court, Feb. 24, 1956).

Where the list of coverage furnished insured was transcribed from a misleading policy prepared by the insurer's agent, plaintiff was entitled to recover for the windstorm damage to his garage since he would have been justified in interpreting the ambiguous policy to mean that the garage was insured.

Report of Life Insurance Committee—1956

JULIUS C. SMITH, *Chairman*
Greensboro, North Carolina

THE Life Insurance Committee of the International Association of Insurance Counsel respectfully reports:

(1) Due to the widely scattered residences of the members of the committee, it has been impossible to have a meeting of the committee.

(2) The principal activity of the committee was the preparation of an article by Harold A. Bateman, of Dallas, Texas, entitled, "Some Changes in Life Insurance Endowments and Annuities Under the 1954 Internal Revenue Code," which was published in the Mid-Winter issue of the Insurance Counsel Journal, in January 1956, at page 70. This was an extremely well written article, pointing out the changes in life insurance endowments and annuities under the Internal Revenue Code, and supplemented in a most useful manner an article of a similar nature by Price H. Topping which was published in the January, 1955, issue of the Journal.

(3) It is noticeable that the quantity of life insurance litigation has slackened off considerably. Some say that it is due to prosperous times since in hard times life insurance litigation picks up.

(4) The matter of most concern to the life insurance industry at the moment is federal taxation of insurance companies. The Joint Committee of the Life Insurance Association of America and the American Life Convention have rendered yeoman service in holding the line on stopgap legislation, but the Treasury Depart-

ment is still fighting for a new bill which will, no doubt, be under consideration in 1957, which would have the effect of creating more taxes for the Federal Government from insurance companies. The Treasury Department seems to be obsessed with the idea of getting a bill that has the general corporate approach rather than taxing a certain percentage of investment income. This is contrary to what has heretofore been the generally accepted method of taxation of life insurance companies, and every effort is being made to prevent the enactment of such legislation.

Respectfully submitted,

Julius C. Smith, *Chairman;* Harold A. Bateman, *Vice-Chairman;* Charles E. Pledger, Jr., *Ex-Officio*; Henry W. Buck, Berkeley Cox, Verling C. Enteman, James F. Flynn, J. Herndon Hansbrough, W. H. Hoffstot, Jr., Robert W. Lawson, Jr., Lawrence A. Long, Joseph R. Stewart, Leelie R. Ulrich.

Report of Marine Insurance Committee—1956

BENJAMIN W. YANCEY, *Chairman*
New Orleans, Louisiana

DURING the tenure of this year's committee, there have been two developments which the committee has felt to be of genuine interest in the marine insurance field. The first of these was the decision of *Wilburn Boat Co., et al., v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 99 L. Ed. 281, 75 S. Ct. 368, 1955 A.M.C. 467, in which the Supreme Court of the United States held, contrary to its earlier decisions, that a policy of marine insurance was governed by the laws of the states and not by the general maritime law; and that a provision of the Texas statutes to the effect that breach of warranty should void the policy only as to losses caused by the breach will control over the general maritime law under which violation of an express warranty was uniformly held to void the policy. This seemed to be a radical departure from well recognized principles of marine insurance law and seemed to invite varied and confused interpretations of marine insurance policies in the various states rather than the uniform interpretation of such policies throughout this country as well as in Great Britain. The probable results of this decision were sketched out and hinted at in an article by the Chairman in the January, 1956, issue of the Journal.

The other important development of the law was the decision of *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 100 L. Ed. 146, 76 S. Ct. 232, a decision having an important effect on the marine industry and on underwriters insuring marine liabilities. This case held that the Longshoremen's and Harbor Workers' Compensation Act does not preclude a shipowner, having been held liable to a longshoreman for injuries caused by unseaworthiness, from effecting recovery from the contracting stevedore, the employer of the insured man, where the allegedly unseaworthy condition was one brought about by the contracting stevedore himself. This important decision was the subject of an exhaustive and excellent article by one of the committee, Stanley B. Long, Esq., Seattle, published in the April, 1956, issue of the Journal.

There are now pending in the United States House of Representatives four pieces of proposed legislation which are thought to be of interest to the Association. Two of these, H. R. 11,119 and H. R. 11,113, are identical bills to amend the Longshoremen's and Harbor Workers' Compensation Act and contain a proposal providing that an employee entitled to compensation from his employer under the act shall not be entitled to recover damages from the officers, agents, and employees of such employer for acts or omissions in the course of the employment. This problem arises out of several cases in which the shipowner, the direct employer of the injured longshoreman was clearly liable under the Longshoremen's and Harbor Workers' Compensation Act, but the injured man brought an action for damages against the

master of the vessel on the ground of the master's alleged negligence. Another change proposed by these bills is to provide that a shipowner, who is not the employer of a longshoreman or harbor worker injured aboard his vessel, shall not be liable for injury to the employee of an independent contractor unless the shipowner and his own employees have in fact been negligent. The purpose of this provision is to avoid the grotesque result of *Alaska Steamship Co., Inc. v. Petterson,* 347 U.S. 396, 98 L. Ed. 798, 74 S. Ct. 601, and *Rogers v. U. S. Lines,* 347 U.S. 984, 98 L. Ed. 1120, 74 S. Ct. 849, in which the Supreme Court held the shipowner liable in damages, on the theory of unseaworthiness, for injuries suffered by longshoremen, where the unseaworthy condition was that of the equipment of the injured man's own employer. The holding of those cases has been somewhat mitigated by the *Ryan* case, but the proposed statute would effectively and completely reverse their result.

The other bills are H. R. 10,119 and and H. R. 11,234. The first of these, among other things, proposes to change the present provision of the Longshoremen's and Harbor Workers' Compensation Act by which acceptance of compensation under an award works an assignment to the employer of any claims which the employer might have against a third party; and provides that acceptance of compensation shall *not* constitute such an assignment.

The other, H. R. 11,234, is designed to prevent a shipowner, held liable for injuries to a longshoreman, from being reimbursed by the contracting stevedore employer even where the accident has been caused by negligence or breach of duty on the part of the stevedore employer. This proposal is admittedly framed to reverse the rule of the *Ryan* case.

It is thought that the new committee might want to continue to keep close watch on the development of the law in these fields and on possible congressional action in connection with the bills referred to.

Respectfully submitted,

Benjamin W. Yancey, *Chairman;* Thomas F. Mount, *Vice-Chairman;* Wilder Lucas, *Ex-Officio;* George E. Beechwood, Barron F. Black, G. Arthur Blanchet, Stanley B. Long, Stuart B. Bradley, Lasher B. Gallagher, William A. Gillen, Wilbur H. Hecht, Robert M. Nelson, R. W. Shackleford, Arthur J. Waechter, Jr.

Report of Committee on Practice and Procedure—1956

W. Frank Worthington, *Chairman*
San Francisco, California

IT IS the understanding of this committee that its duties were to study the present status of federal and state laws, changes or proposed changes therein, and court decisions pertaining thereto and, when occasions require, recommend such action by the Association as may be deemed proper.

The first and only meeting of the committee was held on July 9, 1955, in the Hotel del Coronado, Coronado, California. Those persons at said meeting were: Wm. F. Worthington, Herbert E. Barnard, Junior O'Mara, Frank M. Young.

Other members appointed to the committee were not present at the annual convention. Those present decided to make further inquiry as to the accomplishments of the committee in previous years and to seek an objective.

On August 17, 1955, the committee chairman received a letter from William E. Knepper, Editor of the Insurance Counsel Journal, containing a request that the committee prepare at least two articles for the Journal to be published in the January, 1956, and April, 1956, issues, and that the titles of the articles and the names of the authors be submitted. All members of the committee were notified about the requirement.

In the early part of September, 1955, an excellent letter was written by Mr. R. B. Hart, the contents of which served as an inspiration for the tentative selection of an article to be entitled, "Who Is the

Client?" While the subject may have been outside of the scope of this committee's activities, it would have been of interest to the counsel and at least afforded us some attempt at complying with the request to submit material for the Journal. Much correspondence and consideration were devoted to such an article, and some research was made, particularly into an item in another publication which touched on the subject. The subject was finally deemed to be too controversial and a suggestion that it be mentioned in the Mid-Winter meeting terminated the interest of the committee in it.

The other subject selected was, "Amendments to the Federal Rules of Civil Procedure." Committee member John W. Apperson generously responded to the chairman's call for action and was great assistance in reaching the goal. After considerable correspondence between William E. Knepper, Editor, Lester P. Dodd, President, and Sanford M. Chilcote, member of the Executive Committee, Mr. Josh H. Groce was prevailed upon to write the article.

Mr. Groce devoted a great amount of time in research, personal contact, and correspondence and the rest is history. His splendid article appeared in the January, 1956, issue of the Insurance Counsel Journal, commencing at page 7. He carried through in a one man crusade in opposition to the adoption of Rules 4 (f) and 34 (b) and his efforts inspired activity on the subject. He was able to get the National Association of Railroad trial counsel, the Federation of Insurance Counsel and the I.A.I.C. to protest the amendments. Following the appearance of Mr. Groce at the Mid-Winter meeting of the Executive Committee of the I.A.I.C. at Chandler, Arizona, he was directed to prepare a brief on the subject which he filed in the Supreme Court on March 9, 1956. Mr. Groce communicated with lawyers in every state of the Union.

The chairman of the Practice and Procedure Committee will be unable to attend the convention in July. It is understood that Mr. Groce will be present and it is urged that the International Association of Insurance Counsel obtain from him directly a statement of developments and results of his tireless efforts.

Respectfully submitted,

Wm. F. Worthington, *Chairman;* Laurent K. Varnum, *Vice-Chairman;* Sanford M. Chilcote, *Ex-Officio;* John W. Apperson, Herbert E. Barnard, A. Lee Bradford, Ben O. Duggan, Jr., William D. Knight, Lee H. Kramer, Dan E. McGugin, Junior O'Mara, Peter Reed, Paul C. Sprinkle, Robert C. Vogel, Luther I. Webster, Frank M. Young.

Shall Advocacy Vanish?*

J. A. Gooch**
Fort Worth, Texas

THE subject of my remarks indicates that at some time in the past and, as of now, advocacy has been practiced. To me advocacy is the backbone and the real strength of justice in this great land of ours. The term "advocate" has been linked with the legal profession, and properly so, from the beginning of time. We are a profession that has always taken an objective point of view, as contrasted with the negative or defensive point of view, to the end that principles and ideals shall be maintained.,

History records that the lawyer has been one who at all times stands ready to fight for principles and, with every resource at his command, for what is right and for the rights of his clients, and one who, by reason of that trait of character and by training, is ever ready to oppose tyranny in any form, and one who is ready, or should be ready at all times, to oppose the abuse of power.

We, I am positive, are lawyers by choice. In my opinion there are many ways to make a living in an easier fashion than constantly fighting someone else's

*Address delivered to the Washington State Bar Association, at Tacoma, Washington, August 4, 1956.

**Of the firm of Cantey, Hanger, Johnson, Scarborough and Gooch; past president, International Association of Insurance Counsel.

battles. I dislike very much to see in the movies, on TV and in periodicals the lawyer depicted as a scoundrel and a cheat. No other profession is so maligned as is the legal profession. It seems to have been thus for some time, as our earliest dramas and literature make mention of the lawyer in that view. Did you ever see a lawyer in a movie or on TV in the role of a hero? But so much for our popularity with the so-called entertainment world. These same critics when in trouble seek the best lawyer they can find in their judgment and then expect miracles.

History also records that the legal profession has had a hand and a great voice in shaping the destiny of the world, and particularly the destiny of these United States.

It will be recalled that the Declaration of Independence was framed by an assembly predominantly of lawyers and, may I add, lawyers with a purpose and lawyers who were advocates; lawyers who dared set forth with specific certainty the views of the oppressed and then chart a course for the establishment of these United States.

Let us turn back to the year 1776 and review the position of these great advocates who designed and published the Declaration of Independence. The designers were great lawyers who dared bring an indictment against the Sovereign of Great Britain. Not only did they bring an indictment, but advocated a remedy. Let us read together some of the grievances that those great advocates asserted, some of which might well be considered as current grievances.

A portion of the Declaration of Independence reads as follows:

> "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of absolute tyranny over these states. To prove this, let facts be submitted to a candid world."

Then follow the *facts* as indictment against the yoke of Britain, and among the facts presented we find the following specific charges:

> "1. He has erected a multitude of new offices and has sent swarms of officers to harass our people."
>
> "2. For depriving us in many cases of the benefits of trial by jury."
>
> "3. For taking away our charters, abolishing our most valuable laws and altering fundamentally the forms of our government."

Do these charges sound as if they were coming through arbitration and weak-spined compromises?

Following the Declaration of Independence and the enforcement of those declarations, we adopted a Constitution, clear, concise and readily understandable by all of the people. The Constitution itself indicates that it should be jealously guarded, and by advocates who believe entirely in its teachings and meanings.

The first three Articles of the Constitution remedied the cause of two of the indictments which I have just quoted from the Declaration of Independence, when by their terms there were established three and only three branches of government, with well defined boundaries and with safeguards and prohibitions against wandering beyond those boundaries. Those separate branches, as we all know, were the legislative, the executive and the judicial, in that order.

The Seventh Amendment to the Constitution remedied the other indictment which I quoted, when, by its terms, all litigants were guaranteed the right of trial by jury where the amount in controversy exceeded $20.00.

I would also mention the First Amendment to the Constitution, which gave us *"Freedom of Speech"*, inasmuch as I invoke its protection in my remarks to you at this time, and I further state that same First Amendment created and suggested an advocacy proceeding and that its teaching is that advocacy should be practiced.

Some of you, if not all, are probably now silently asking me, "Just what do the quoted passages of the Declaration of Independence and the Constitution have to do with the topic you are to discuss?" I shall do my best to answer that question.

Many of you have seniority on me, both in years and in experience, and most of you can remember by reason of presence or by reason of historical reference the time when the Constitution of the United States was not referred to

as "a flexible thing" to be interpreted by the yardstick of any pressure group, but on the other hand was regarded by all as a definite and well-understood set of rules by which our lives and fortunes should be lived and preserved.

By the turn of the last century, our Constitution had withstood many and varied attacks by advocates who dared express their views concerning its meaning. Its provisions had been clearly interpreted by competent jurists who sought to interpret it in occordance with the thinking of the people who created it and, may I say, those interpretations were consistent and were generally accepted. Advocates of both bench and bar had done a great work in seeing to it that the original concept of a government of the people, by the people and for the people be maintained.

Let us now talk of a new era, and of this era I had a front row seat. I finished law school in 1929 and had I not been presented with a shingle by a friend of long standing in July of 1929, it would have been quite a number of years before I could have acquired one from my own resources. The depression and I began the practice of law at the same time.

Prior to entering law school, I lived in a small central Texas town, where one of our closest neighbors was the leading lawyer in that village. He was known far and wide for his intelligence and ability. He was ever ready to express his opinion, when sought, on any matter or controversy concerning the good of the community. He was not one to compromise a principle, regardless of opposition either in number or quality. I suppose it was through admiration of his steadfastness and positive thinkng that I decided to study law, 'though I must admit that my alternative prospects picking cotton and milking cows made my choice much more simple.

In law school we were taught by able professors that the Constitution of the United States was, insofar as government was concerned, the equal of the Ten Commandments insofar as morality was concerned. We were told and believed that the three branches of government were controlled by well defined boundaries and that these boundaries were not to be trespassed either by the other branches or by the citizens living under the Constitution.

We were told and believed that the pronouncements of the highest court in the land were carefully considered opinions rendered by outstanding jurists and scholars, with the able assistance of advocats. We were shown that well thought out principles of substantive law had been established. And we were told that we could rely upon established precedent in the practice of our profession. We were told that when we were to give advice to a client, we could inform that client that since the Supreme Court of the United States had established principles of substantive law, he could rely thereon in the conduct of his life and business on those established precedents. And we were told that any attempt on the part of any other branch of the government to deviate from those established principles would be certainly check-mated by the court of last resort. It was with this armor that we went forth to seek a livelihood.

Either with the depression or by reason of the depression, I have never understood which, I saw spring up gradually at first, and then akin to mushroom growth, countless administrative agencies, commissions and bureaus. I saw the alphabet distorted to where almost any combination of its letters would represent a bureau, agency or commission. I saw the courts by-passed. I saw each administrative agency, sufficient unto itself, lay down a set of rules of its own, establish its own jurisdiction, and totally ignore all rules of evidence.

I saw a growing resentment on the part of the heads of some of these agencies against the lawyer as such. We all know of instances where the only prerequisite necessary to practice before a tribunal is to be present. No qualifications are demanded, and perhaps none needed, in that the head of some of those agenices is the lawyer, judge and executioner, and in most of those instances, the head of the unit himself is not a qualified lawyer.

With every alphabetical agency and bureau, each sufficient unto itself, came loose leaf services in ever increasing abundance and with ever increasing costs, since a weekly bulletin must of necessity be read before daring to tell a client what his rights or remedies might be on a given topic. As an example, I refer particularly to the decisions of the Nation-

al Labor Relations Board and the Wages and Hours Division of the Labor Department. Those of you who practice in those fields know exactly what I am talking about.

And if these usurpations of judicial functions were not enough, let's take a look where we are headed in court practice and see if we are not allowing ourselves to become the "Last of the Mohicans" so to speak.

I refer specifically to the rules of court now in effect in the states of New Jersey and Pennsylvania. Let's take New Jersey first. I have it on excellent authority that all cases in New Jersey are pre-tried by the court, which of course in itself is not so bad, although I do not yet believe wholeheartedly in pre-trial, for most of my experience with pre-trial has been where a settlement of the case, regardless of merit, is the prime object of pre-trial. But at the pre-trial in New Jersey, the attorneys for the opposing litigants are made literally to open their respective files to each other, to furnish each other the names of their witnesses, and to inform each other of the substance of the testimony of the witnesses under the penalty that, if an attorney omits the name or fails to reveal the name of a witness, he cannot at the trial of the case call such omitted witness, except under most unusual circumstances which are almost impossible to meet. Is that the proper way to achieve justice?

It might be if the ideology it presumes were actually present, but to my mind and experience, to be fore-warned is to be fore-armed, and it has been my experience that cross-examination is the best test of the story of a witness, and by reason of being fore-warned, cross-examination is reduced to a dull routine, in that the element of surprise is completely eliminated, and the witness knows in advance what his answers are to be. The vigilant, hardworking and conscientious lawyer and his client are penalized because they are prepared for trial, while the lazy borderline lawyer is aided to such an extent as to be grossly unfair. Believe you me, I am glad I do not have to practice in New Jersey.

Now let's take Pennsylvania. By legislative enactment, cases involving $1,000 or less are tried by a board of three members of the bar sitting as arbitrators, selected alphabetically from a list of the lawyers in the jurisdiction of the court. Litigants not satisfied with the award may have a jury trial, but in that event they must pay the arbitrators' fee — about $25.00 each — which otherwise is paid by the county.

You say that is fine, that such a system eliminates the nuisance and non-profitable cases. But where does it lead and where will it end? The $1,000 figure could just as easily have been placed at $50,000.

And if these trends are not significant as to what is happening to our profession, let us review the agitation now prevalent in a great number of states to eliminate tort litigation from the courts entirely. Statistics have been compiled which show that over 80% of the courts' dockets are made up of tort litigation. What will become of the trial lawyer, the advocate?

Some of you will say, "That is your selfish view being expressed. Justice can be served without an advocate." Is that true? I say it is not true, for the trial lawyer, the advocate, is the last barrier before tyranny!

What did our forefathers say in the Declaration of Independence concerning usurpation? "He (the King of Great Britain) has erected a multitude of new offices and has sent swarms of officers to harass our people. He has deprived us in many cases of the benefits of trial by jury. He has taken away our charters, abolishing our most valuable laws and altering fundamentally the forms of our government." Never were those phrases so apt as of this day.

Those who favor the departure from full dress trial where principle is involved, by the more expedient method of arbitration and forced compromise, use as their ammunition the age-old cry that court calendars are congested and delays work a hardship on litigants. This plea is not without merit in some instances, and we, the lawyers, have nobody to blame but ourselves, for we could, if we would, clean up every docket in the United States. We would just have to quit procrastinating and get our cases disposed of.

I know a law firm which is trying to do something about it. The firm has six men in the trial department and they have entered into a pact whereby each lawyer is fined $50.00 for every continuance or postponement he procures unless he can show by a preponderance of the evidence to the remainder of his group that the delay was absolutely neces-

sary and not by reason of being unprepared or scared. These $50.00 fines go into a pool and are used for a fun party when the amount is sufficient for such purpose. I happen to know that the fund for this year is nil, and, according to those in the pact, it is hoped that the fund remains nil, for cases are being disposed of, litigants are happier and know the results without the burdensome and worrisome delay in the day of judgement.

If we, as lawyers, will wake up to the fact that we are about to become extinct, we can do something about these encroachments and maintain a position where we can and will see to it that encroachments are stopped and eventually abolished and that we return to a constitutional government which proclaimed the advocate as the defender of that form of government. The cure cannot come overnight, because we have slumbered and coasted with the times without realizing that we are gradually being relegated to the "has been" category.

Let us take a look at some of the results of administrative practice. More and more the lawyer must become the specialist because it is impossible for one man to keep up with the myriads of reports and digests that flow into a law office daily, And, I might add parenthetically, that it is also rather hard to pay for these periodicals because they are not exactly cheap, with the result that either the specialty seeks the man, or the man seeks the specialty.

Under the speciality system, the lawyer of necessity loses contact with the people in general and becomes business-wise — and sometimes otherwise — known only to a select few who require his skill. He loses contact completely with the people who sit as jurors and, to my way of thinking, a working knowledge of the thinking of an average juror is quite important to any decision where a factual question is involved. In my opinion, the specialty should find the lawyer, rather than the lawyer select the specialty, and only after having had a try at advocacy before a court and jury.

I do not mean to imply that all lawyers should be trial lawyers. Many lawyers do not have the temperament or the desire to do battle in court, and that I do not condemn. But I do say that every lawyer should have at least some trial experience either in the front seat or the back seat, so that he will have firsthand experience in the niceties of psychological court warfare, in order that he may learn not only to think quickly and in an emergency, but to show him that small and sometimes apparently insignificant matters are really important.

For instance, a witness while on the stand, before answering any questions propounded to him on cross-examination, would cast a sidelong glance at his attorney. The cross-examiner noticed this trait and properly lengthened the cross-examination and went as far afield as he dared in an attempt to test the witness' knowledge of the matter involved. Having successfully diverted the witness' attention from the prime question in the case, he suddenly returned to the point with a question and followed quickly with a further interrogatory, as follows; "Now just how were you told to answer that question?" To which the witness replied, after a long look at his counsel, "I have forgotten what he told me." The witness then broke down completely and justice prevailed.

I think advocacy is the path that was laid out for our existence. We as a profession, by reason of training if no other, should be qualified to analyze most every situation involving matters referred to us. We are told that we must see clearly both sides of every controversy and then select fairly and honestly the best approach in which we can present our client's problem.

Many of you have been called upon to represent a litigant accused of a crime, sometimes with pay and sometimes without that necessary ingredient, because under our laws every person charged with a crime has a right to a trail by jury and a right to be represented by competent counsel. Such a chore is not only our duty but our privilege. You all know of instances where at first blush an alleged crime seems so unjustified as to be revolting to a lawyer to defend, and I dare say that in a vast majority of such cases the crimes are just as revolting as they seem to be. But every man has a right to be found guilty by a jury rather than by an aroused public. To my mind the saving of the life or liberty of but a single individual worthy of being saved by reason of being not guilty is worth all of the time and effort which, of necessity, go into the investigation and defense of an accused.

In connection therewith, I wish to pay

tribute to that group of advocates, a member of which is Earle Stanley Gardner, of the neighboring state of California, who have dared risk the wrath of an opinionated public in carefully inquiring into and investigating cases where persons have been convicted of crimes who maintained with some reason their innocence. As you will note from the press, there have been several instances wherein that body, which is called "The Court of Last Resort", has proved by perseverance and proper investigation that an innocent man has been convicted of a crime he did not commit. Such an act is that of a true advocate, who is willing to take the time to see to it that our basic and fundamental concepts are not violated.

Turning again to the encroachment of administrative law in our courts, let us examine our law schools. Three years ago a questionnaire was sent to ten leading law schools in our section of the country in which the placement chairman in each law school was asked to conduct a poll among the senior law students as to their preferences of practice. The result was that less than 7% of the number participating in the poll, which incidentally was quite representative of the number involved, listed trial work as their first preference. Further questioning of a cross-section of those who did not list trial work as a preference revealed that the following were their reasons for preferring other fields than trial work:

1. Trial work is too hard and requires too much effort.
2. Trial work is on its way out.
3. Administrative practice is more lucrative.

Is that a healthy sign for our profession and for the survival of advocacy? I do not think so.

What is the remedy if advocacy is to survive? These are my thoughts:

1. Let us dedicate ourselves to the principles of government upon which this nation was founded and fight singly and in assembly for the return of a state of affairs where decisions concerning our lives, liberty and fortunes are vested in the judicial branch of the government.

2. See to it by voice and ballot that the judiciary is manned by men eminently qualified by education, experience and temperament to sit on the benches of our courts and men who have the courage to follow sound, tried and proper precedent.

3. Go into the law schools with seminars and lectures sponsored by our bar groups and attempt to sell our embryonic brethern on the idea that advocacy is worth maintaining and give reasons why. See that these men know that the survival of the nation depends upon our profession as the watch dog for the maintenance of a true democracy.

4. Preach on all occasions and to all forums the gospel of a government of the people, by the people and for the people, and that established rules for conduct which have been tried and found good shoud survive and be carefully maintained.

The philosopher Voltaire defined an advocacy proceeding when he said — and I believe I quote him fairly accurately,— "Sir, I do not agree with a word you have said, but I defend with my life your right to say it". If we are to believe such a philosophy, let's say what we think!

Are we afraid to voice our opinions? Are we afraid to let our neighbors and the world know where we stand on the principles of our heritage? Are we to continue to sleep soundly or drift with lethargic indifference with the times? Are we ready to accept compromise of ideals and conscience rather than face the rebukes from those who would turn us into spineless referees? Are we as a profession content to allow this nation to become socialistic? Are we to lose our own self-respect by inertia? Are we to allow our heritage to lapse by reason of encroachments? Are we to be governed by selfish minorities? Are we to refuse to defend with our lives the laws of this country which created our great nation, nursed it into a place of prime importance, and established it as a powerful good?

I say that these questions must be answered with a resounding negative.

We must, if this country is to survive, take the inititative as a group and as individuals. We must see to it that the way of life as outlined by those great advocates of the past, that individual rights, as guaranteed by the constitution, remain inviolate and firmly restored. We must awaken to the fact that only with positive thinking, positive action, both coming from a sturdy advocate, we can escape a state of affairs where the individual rights

are relegated to the whim of a select minority whose sole aim is power for themselves rather than for the good of this nation.

I am not a politician nor a candidate for any office. My political faith varies with the caliber of the man who presents himself for public office and the things for which he stands. So I am neither for nor against any political party as such. Therefore I reserve the right to be critical of any form of government, regardless of the branch, which either protects or lends support to ideologies which tend to weaken the faith of our people in the future of this country.

The future of this country depends upon the restoration of absolute integrity, and the person to restore that status is the advocate!

Why The Appeal?*

HONORABLE SHACKELFORD MILLER, JR.**
Louisville, Kentucky

PRESIDENT LESTER P. DODD: And now, ladies and gentlemen, our principal speaker this morning is a gentleman whom I have known for a considerable period of time and, I may add, altogether favorably. He comes from the great state of Kentucky and I can truthfully say that he epitomizes the qualities which we have come to regard as the characteristics of a true southern gentleman, including those traditional ones that have to do with the ability to judge horseflesh, women and bourbon whisky. But he is an able judge in other fields. He is one of the most able and I believe one of the most highly-regarded members of the federal judiciary. He is a judge of the Sixth Circuit of Appeals, which circuit, as you no doubt you all know, comprises the states of Michigan, Ohio, Kentucky and Tennessee.

It is a genuine privilege and a real pleasure to me to be able to present to you this morning the Honorable Shackelford Miller, Jr., of Louisville, Kentucky. Judge Miller!

[Judge Miller received a standing ova tion.]

THE HONORABLE SHACKELFORD MILLER, JR.: Mr. President, members and friends of the association: I am not an insurance lawyer, but sometimes I wish maybe I had been. Although I am accordingly somewhat of a stranger among you, I have in the course of twenty-four hours found myself very much at home. It has been a very delightful hospitality which you have extended to me and I am delighted to be here.

I have a slight feeling, however, from what Lester Dodd said, that maybe I am just being looked at, and since it is the morning of stories, and sometimes political stories, it reminds me of an experience which I had a number of years ago.

We have politics in Kentucky as well as you have them in West Virginia, and we have both Democrats and Republicans in Kentucky. Some twenty-odd years ago we had a very hot campaign down there for United States Senator in which Senator Barkley was running against Governor Happy Chandler. My good friend, Bob Hobson, and I were both interested in that campaign. I happened to be working in Senator Barkley's campaign headquarters and one day my secretary came in and said that there was a delegation from Johnson County that had just called and wanted to make an appointment to talk to me the next day.

Well, Johnson County is over in the eastern end of our state, very close to West Virginia—maybe some of these men had lived in West Virginia originally and had migrated over to our part of the coun try. In any event, we gave them an appointment for four o'clock—delegations from all parts of the state were coming in at various times, largely wanting to know how much money they were going to get on Primary Day.

I have forgotten about the details, but the next day at four o'clock my secretary

*Address delivered at the Twenty-ninth Annual Convention of the International Association of Insurance Counsel, at The Greenbrier, July 12, 1956.

**Judge, U. S. Court of Appeals for the Sixth Circuit.

came in and said the delegation from Johnson County was there. I said to show them in. These six tall, lanky men walked in rather slowly. I asked them to take seats around the wall where the chairs were. One of them lead the way all the way round and they all sat down. I said, "How are you, gentlemen?" Nobody said a word. I said, "Well, I am glad to see you all here this morning. I suppose you have something to talk to me about. What shall we talk about?" Nobody said a word. I said, "Well, the fact that you men came all the way from Johnson County here, to Senator Barkley's headquarters, lets me know that you are interested in Senator Barkley. The fact that you find me here at Senator Barkley's headquarters should let you know that I am interested in Senator Barkley. Now, let's let our hair down and tell me what you want to talk about." Still no word. I said, "Well, I know you gentlemen didn't drive all day today to come here and are going to drive back all day tomorrow just for the purpose of being in headquarters. You want to talk about something, don't you?" Still no word. So I addressed myself to the man on the end. "Well, young man," I said, "Let's you and I have a little talk between us." You live over there in Johnson County and I live here. Tell me what you want to do here today."

He sort of looked around, he must have got the family eye from all the rest of them, He said, "Well Mr. Miller, I will tell you." We are all Johnson County Democrats."

I said, "Good! I am glad to hear that."

He said, "We are Barkley Democrats."

"Oh," I said, "That's fine. I am,too. We are getting along splendidly."

"We have supported Senator Barkley in all of his campaigns."

"Good! Fine!"

"And we hope to do it this time."

I said, "That's right."

He said, "Well, the other day we all read in the paper where Senator Barkley had appointed Shackelford Miller, Junior, to help in his campaign. We got together and talked about it. None of us knew you. None of us had ever seen you." and he added, "that 'Junior' business worried us. We came up here to see what you looked like. We don't want no whipper snapper managing our Alben's campaign." (Laughter)

After that we got along very well.

When my good friend, Bob Hobson, phoned me one night as long ago as last December and extended me the invitation to be with you here today and make a talk, my reaction is shown by the reply which I made to him. I said, "Bob, I don't know anything about insurance law." Of course he could have said "Well we don't know much either," but he made no such confession.

He said, "You don't have to talk about insurance law. We can understand anything you want to discuss."

I realized then that I was in trouble. I realized that I shouldn't have said I don't know anything about insurance law. It so happened that I didn't study insurance law when I was in law school. You know, we all make mistakes. I have since learned how many mistakes I made when I was in law school selecting my subjects.

After the first year when you take the subjects you are required to take, like Torts and Real Property, Evidence, demonstrative and otherwise, Pleading, things of that kind, you get the elective courses in the next year. They had Bankruptcy there. I thought, "Oh, I am never going to practice Bankruptcy law. I'll skip that." They had a course in Admiralty. I said, "Well, we haven't much water down there in Louisville. We have the Ohio River, but we don't have many accidents on it. I don't need any Admiralty law. We will skip that." They had a course on Patents, and I said, "I never want to have anything to do with patents." I don't think we have a patent lawyer in the city of Louisville. There may be one there now. So I skipped Patents. There was a course on Federal Procedure, and I said, "Well, most of the lawyers don't practice in the Federal courts. They do all their work in the state court. I will skip that." Of course, I skipped Insurance, too. And they did have a course on Federal Taxation, which I also thought I wouldn't need—that was many years ago—and I skipped that, too.

Well, time moved around and some twenty years later I find myself out in the Federal Court where we have every day Federal Procedure, Admiralty, Bankruptcy, Patents, and all of the courses which I deliberately overlooked in the law school.

In overlooking Insurance I have no doubt that I thought that I never had any

prospect of representing an insurance company in Louisville. They were all well represented. I knew their attorneys were going to take care of them and see that they didn't go elsewhere. Maybe I thought that it would be more financially compensating if I devoted my talents to the Law of Torts and the Law of Evidence. I realize now that that assumption was clearly erroneous. I know certainly that I never anticipated that many years later I would appear before such a gathering as this, where any knowledge which I might have about insurance law would certainly stand me in good stead.

I can't truthfully say I know nothing about insurance law. I learned some the hard way, as all of us have learned. I remember when I was a young lawyer my father conferred with me about a life insurance case that came into the office. We were on the same side as you are, defending it, and in discussing some of the fundamental principles of insurance law I remember he made the statement to me, "Well, you know"—he had served a term on the Court of Appeals of Kentucky—"there was a judge on our Court of Appeals that tried to change the law of insurance while I was there. When I first went there when we had an insurance case and we went into conference usually the first question he asked was, 'Well, did the insured pay the premium?' And if he found that he did why, usually he won his case.

"After a few years, however, I found that the question had been a little changed, and when he would go into conference the first question he would ask was, 'Did the insured promise to pay the premium?' " (Laughter)

I have never forgotten that commentary on the law of insurance. I have learned since, however, that all, or most, insurance counsel—and particularly the members of this organization—do not give wholehearted approval to either of those two propositions, although recognizing, of course, that they have some practical application.

With the law of insurance, then, in such confusion, I hasten to act on Bob Hobson's suggestion that I talk to you about another subject.

Over the past number of years I have been interested in analyzing the appeals that have come to our Court of Appeals So many of them have so little merit that one wonders at times why the appeal was really taken. It is only natural that when a lawyer has tried and lost a case in the trial court that he should feel that he would like to have that judgment reversed through the medium of appeal. I presume that some of you, at least, have had that experience. Accordingly, the first thought that comes to him is, "We will appeal this case and see if we can't get it reversed." But I am sure that you have experienced, as most trial lawyers have experienced, that cases in the main are won and lost on the trial level and that it is a great deal more diffcult to come to the Court of Appeals on the points that you have made in the trial court than it is to argue those before a trial judge.

An experienced trial lawyer necessarily recognizes the limited scope of the appeal, and in many cases the slim chances which he has of prosecuting that appeal with success. A large percentage of appeals which have little chance of success is the result of the failure of appellant's counsel to realize the scope of the appeal. This is particularly true in the case of counsel who have had no previous experience in appellate practice and who apparently come to the Court of Appeals prepared to argue their case *de novo*. A lawyer who is experienced in appellate practice, Federal appellate practice particularly, realizes that the scope of review is rather narrow and that in many cases, such as where only a question of fact is involved, there is very small chance of success. The wining or losing of many cases in the district courts depends chiefly upon the facts. In such case the law is well settled and it is somewhat a routine procedure to apply such settled law to the facts as they are found to be by the trial court.

A brief reference to some of the statutory provisions will show the heavy burden resting upon an appellant who comes to the Court of Appeals complaining about the findings of fact in the court below.

Of course, all of you are familiar with Rule 52 (a) of the Rules of Civil Procedure, which provides that in all actions tried upon the facts without a jury the court shall find the facts specially and "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of

the witness." There is some slight modification of that rule in the new amendment, but essentially it is the same.

The Supreme Court in applying this rule has said: "A finding is 'clearly erroneous' when although there is evidence to support it the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525.

This same rule is by reference made applicable to findings of fact by the U. S. Tax Court when appeals are taken from judgments of the Tax Court to the Court of Appeals. Section 7482 of Title 26 provides that "United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court ... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Of course, prior to this statutory enactment of June 25, 1948, findings of fact by the Tax Court were even more difficult to upset under the so-called Dobson Rule as explained by the Supreme Court in *Dobson* v. *Commissioner* 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239, which rule, of course, is no longer in effect by reason of the legislation which I have referred to.

Over a number of years in the past there has been a large number of reviews by the courts of appeals of orders entered by the National Labor Relations Board, on behalf of the Board seeking enforcement of the orders, and sometimes by management seeking the vacation of such an order. From time to time real troublesome questions of law are involved in those reviews, but in a great many of the reviews practically the only material question which is before the court is the validity of the Board's findings of fact. In this respect Section 160 (e) and (f) of Title 29 provides: "The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The Federal statutes also provide for a review by the courts of appeals of the rulings of other administrative agencies. The validity of such rulings is in many cases dependent upon the findings of fact made by the agency. In these reviews the court is controlled by the provisions of the Administrative Procedure Act of 1946, which provides that the reviewing court shall set aside agency findings which are "unsupported by substantial evidence" upon a review by it of the whole record. Section 1009 (e) (b) (5), Title 5, U. S. Code.

Although these different statutory provisions are somewhat different in language they have one common result, namely, they materially limit the scope of review by the appellate court of findings of fact by the court or agency in which the proceeding was originally tried. It is well settled law that it is not enough for the Court of Appeals to disagree with the findings or to be of the view that it would not have made such findings if it had heard the case originally. In order to set aside such findings it must be able to say that they are either clearly erroneous or not supported by substantial evidence on the record considered as a whole.

Yet time and time again counsel representing the appellant in such review proceedings either is not informed of these rules or attempts to ignore them by reviewing to us the evidence supporting the position which he took in the lower court. Unfortunately for him, we are not so much interested in the evidence which was favorable to him as we are in the evidence which was unfavorable to him in trying to determine whether or not the evidence of his opponent was substantial enough to sustain the finding.

We have an analogous question in cases involving trial by jury in which there are no findings of fact by the court. In both civil and criminal cases often the principal point relied upon by the appellant for reversal is that the evidence was insufficient to support the verdict, or that a motion for a directed verdict should have been sustained. The rule has been settled and stated many times in our circuit: "For the purpose of determining whether the evidence was sufficient to support the judgment the Court must take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom most favorable to the prevailing party and determine therefrom whether the finding was supported by substantial and competent evidence, and where there is substantial and competent evidence, which if believed, supports the conviction, or the verdict, the appellate court can not weigh the evidence or determine the credibility of the witness. 'Substantial

evidence' is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Battjes v. U. S.* 6th Cir., 172 F. 2d 1.

And dealing with the question of a motion for a directed verdict, the rule has been stated that upon a motion for a directed verdict the trial judge should overrule the motion unless, reviewing the evidence in the light most favorable to the plaintiff, there would be no substantial evidence to support a jury verdict if returned for him, and that if fair-minded men could draw different inferences from the evidence, the case should go to the jury. *Hutchins v. Akron, Canton and Youngstown R. Co.,* 6th Cir., 162 F. 2d 189.

Of course, I know that practically all of you have experienced the application of those rules. But regardless of these well-settled rules, counsel for appellant in such cases often tries in oral argument before the appellate court to convert the court into a jury and to reargue to the court the same questions of fact which were argued to the jury below.

Turning now to those cases where the appeal involves a question of law rather than a question of fact, we again find many appeals taken where a fair evaluation of the situation should convince the appellant that his chances of success are small. A failure to fully understand or appreciate the rules determining the law of what forum will control the decision sometimes causes an appellant unexpected trouble.

Since the decision of the Supreme Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, it is well understood that in diversity of citizenship cases the Federal court must apply the law of the state where the court is sitting, except where the Constitution, treaties or statutes of the United States provide otherwise. Accordingly it some times happens that a case from the Court of Appeals of your own circuit which appears directly in point may prove to be of no value whatsoever in arguing the appeal of your own particular case. This can result from the fact that the case relied upon was decided by the Court of Appeals prior to the decision in *Erie Railroad Company v. Tompkins,* and accordingly does not represent the state law on that question. Or the decision relied upon, even if a recent one, may be on appeal from the district court of another state and represents the law of that state rather than the law which the Court of Appeals will be required to follow in your particular case. The question can be sometimes complicated by the injection into the picture of the question of conflict of laws.

I recall an interesting case which came to our court a few years ago where in a diversity of citizenship action damages were sought for injuries suffered in an airplane accident. In that particular case, the contract of transportation was entered into in one state, the accident occurred in a second state, and the suit was brought in the district court of still a third state. And, of course, it must always be borne in mind that the rule of *Erie Railroad Company v. Tompkins* is applicable to diversity of citizenship cases only and in cases where jurisdiction does not depend upon diversity of citizenship the state law may afford an appropriate guide but is not controlling. *American Textile Machine Corp. v. U. S.,* 6th Cir., 220 F. 2d 584, 587.

In cases where the Federal law is controlling we frequently run into situations where there is a conflict in rulings between different circuits, which has not been resolved by the Supreme Court. When no one of the different rulings is from your own circuit it is of course permissible and desirable that one of the rulings be argued to the court in preference to a ruling from another circuit. But I am sure that it is well recognized by experienced counsel that the Court of Appeals is not apt to depart from its own prior ruling in a similar case and embrace a different ruling from another circuit. Yet we find some cases are tried in the district court and even appealed to the Court of Appeals in the hope of persuading the court to adopt and apply a conflicting ruling from another circuit.

I listened to the opening argument of counsel for the respective parties a number of years ago when I was trying a tax case in the district court, and then enquired of the Government counsel if the Court of Appeals of our circuit had not passed on the identical question involved adversely to the Government's contention. Counsel replied in the affirmative but also stated that there was another ruling favorable to the Government's contention from the Court of Appeals of the Second

Circuit. When I asked him if he expected us to follow the ruling of the Second Circuit instead of our own rule he merely said, "Well, we hope very much that Your Honor will do so." His optimism proved unfounded without the necessity of extended argument.

There are sometimes circumstances, however, which justify taking an appeal even though the law of your circuit and other circuits is unfavorable to your contention. If the Supreme Court has not passed upon the question, which is often the case when a new statute is involved, and is sometimes the case when new questions arise even under an old statute, there is always the chance that the Supreme Court may rule upon that question before your appeal is disposed of. It is a well-settled principle of appellate practice that an appeal will be decided in accordance with the rule as it exists at the time of the appellate court's decision, and accordingly a change of law pending appeal may prove to be a life-saver to an appellant. *Carpenter v. Wabash R. Co.*, 309 U. S. 23, 27, 84 L. Ed. 558 60 S. Ct. 416.

This results in the somewhat unusual situation that although a case was correctly decided by the district court, the judgment will nevertheless be reversed by the Court of Appeals or by the Supreme Court if the law has changed during the interval. I will always remember an experience along this line which I had during my early days on the Court of Appeals. Mr. Walter Armstrong, of Memphis, whom some of you may remember very well, one of the leaders of the bar in the state of Tennessee, a former president of the American Bar Association, appeared one day to argue an appeal on behalf of an injured railroad employee, whose action under the Federal Employers' Liability Act had been dismissed by the district judge.

In reading the briefs the night before I wondered why a lawyer of his ability and experience would prosecute such an appeal when the well-settled law was so clearly against him. Evidently the presiding judge of our court had the same view. Following Mr. Armstrong's statement of the facts and the issue involved, the presiding judge asked him if the question had not been often ruled upon by our court contrary to him and on what authority he might be relying. Mr. Armstrong replied that in present world affairs things moved quickly; that in Washington they were apt to move more quickly than in other parts of the country; and that in particular in Washington on some Monday mornings things moved faster than ever known before. He then stated to the court that he had in his hand an opinion from the Supreme Court of the United States handed down just four days prior thereto which not only changed the law in Federal Employers' Liability cases but also changed it in such a way as to fully sustain his contention in the case.

He called our attention to the opinion in the case of *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, which some of you are no doubt familar with, where the court announced a rule of negligence and causation that differed very materially from what we had learned at law school and worked with in our practice in the state courts. No doubt many of you are quite familiar with what the court there said, but in connection with what I am now talking about it may be interesting to refresh your memory.

The court said: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

It is to be noted also that the Supreme Court has recently applied the same rule in an admiralty case under the Jones Act, in *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523, 100 L. Ed. 430, 76 S. Ct. 608, decided last April.

There is another type of appeal which comes to the court with probably one

or two strikes on it before it is argued. For some reason or other there finally dawns upon counsel for the losing party that he overlooked in the trial below an issue upon which his case might have been rested with success. Accordingly, an appeal is taken and this new issue presented to the court with much vigor. Ordinarily, an appellate court does not give consideration to an issue not raised below, or questions of law not ruled upon by the lower court. If the issue had been raised in the lower court it is quite possible that the opposing party could have successfully met it there. Appellate courts are reluctant to decide decisive questions of law which have not been presented to and ruled upon by the lower court. *Helvering v. Wood,* 309 U. S. 344, 84 L. Ed. 796, 60 S. Ct. 551. It must be an exceptional case or one involving particular circumstances where injustice might otherwise result to prompt a reviewing court to consider questions of law which were neither pressed nor passed upon below. *Hormel v. Helvering,* 312 U. S. 552, 85 L. Ed. 1037, 61 S. Ct. 719.

The foregoing review of various types of appeals which come to the court with less than the average chance of success is not meant to be an implication that lawyers advising and taking such appeals are not aware of the unfavorable prospects for a successful appeal or that they are derelict in the representation of their clients in advising such an appeal. Of course there are some lawyers who, inexperienced in appellate work, may not fully realize the narrow scope of the appeal or the settled condition of the applicable law which confronts them. In such cases experience is a valuable teacher.

There is another class of litigants whose appeals are very numerous and who obviously give little consideration to the real merits of their case. I refer to the numerous appeals taken by defendants in criminal cases in both the state and federal courts, who, after trial, conviction by the lower court and affirmance by the appellate court, later file petitions for habeas corpus or motions to vacate judgment under Section 2255 of Title 28 U. S. Code. Such appellants, usually representing themselves, are not lawyers and usually fail to realize that an appeal is not a de novo hearing. I was quite surrised at the number of such proceedings which we have. They comprise a good portion of our docket, although, of course, most of them do not take so much time to dispose of.

It is also true that probably an appeal is often taken as a matter of professional pride in an endeavor to show to a client that it was the inadequacies of the trial judge rather than the deficiencies of the trial attorney that resulted in the loss of the case. This attitude is many times reflected by the shot-gun type of brief that is filed in support of the appeal where innumerable and inconsequential points are raised, the sum total of which, if all were well taken, would not reasonably constitute reversible error. Probably here is as good a place as any to remind the appellate lawyer that showing error on the part of the trial judge is not by itself sufficient to win a reversal. An appellate judge who has had experience on the trial court is very much aware of the difficulties which beset a trial judge whom experienced trial counsel, including insurance counsel, attempt to draw in different directions. Particularly do they know that to err is human and that but few cases would stand unreversed if any error was grounds for reversal.

In the first year of my service as a trial judge I had a vigorously contested libel suit against a Cincinnati newspaper. I had, of course, studied libel and slander in law school. I had defended one slander case while a practicing attorney. I knew the general principles of libel and slander law but was hardly able to adequately meet the many questions that were presented by the able trial counsel representing the respective parties. At the close of a two-day trial I give instructions to the jury to which both sides strongly objected. While the jury was considering the case I reviewed in my own mind the numerous errors which I was sure I had made and which I was sure would result in a reversal, and I resolved that I would know much more about the law of libel when the case was reversed and sent back to me for a new trial.

The jury's verdict opened to me a new avenue of thought, promptly followed by much relief. The foreman announced: "We, the jury, find for the plaintiff in the sum of six cents," and judgment was accordingly entered for that amount. What a cure-all such a verdict turned out to be! On plaintiff's motion for a new

trial I merely had to rule that no error of the court against the plaintiff—although there were numerous ones—was prejudicial, as the jury had found in the plaintiff's favor regardless of such errors. And of course it automatically followed that the defendant newspaper would not complain of the errors committed against it when its liability had been limited to only six cents. The case was not appealed and today stands on the credit side of my record as a district judge, instead of being included among those cases which were appealed and reversed.

As indicated above, I am sure there are lots of appeals taken by lawyers who are fully aware of the lack of any reasonable prospect of success. There are always cases where an appeal will be considered as the last line of defense even if fighting a losing battle. As a delaying movement or as a tactical move in support of an offer of compromise, it can at times be used advantageously. Coupled with a congested docket it presents a strong practical argument for a settlement. Though not provided for such a purpose, the right of appeal is frequently so used. It is probably a good thing that an appellate judge, after some years of experience, knowing the ability of the appellant's lawyer and evaluating the evasiveness of his answers to crucial questions directed to him, learns to recognize such an appeal and to realize that the legal world will not be startled or the appellant's lawyers even be surprised by an affirmance of the judgment below on a short *per curiam* or order with citation of but few applicable authorities.

While not particularly germane to the subject, it is interesting to consider the appeal from the viewpoint of the trial judge. I have had that experience also. A trial judge during the first year or two of his work in the trial court is frequently surprised and often annoyed by the taking of an appeal which, in his opinion, is competely without merit. But as we have above pointed out, such appeals, for one reason or another, are frequently taken. It takes but a short time for a trial judge to realize that an appeal is not necessarily a criticism of his handling of the case or his final judgment. He is of course pleased when a judgment is affirmed. He is particularly pleased when the judgment is affirmed: "on the grounds and for the reasons stated by the trial judge in his written opinion." He realizes that in many cases the question involved is a close one, that it may involve a question of law not previously ruled upon in his own circuit, and that he has been called upon to choose between conflicting rulings in other circuits. In such cases he realizes that he has made his best judicial guess and that chances of affirmance or reversal are about even. Accordingly, he is not annoyed or concerned if the judgment is reversed. He is usually pleased to have the question settled and to know it will be easy sailing for him in later cases involving the same question.

But there are other cases in which he is firmly convinced he is right and an order of reversal comes as a surprise and a shock. Sometimes the opinion of the Court of Appeals is convincing. Sometimes he realizes that he was led astray by a persuasive argument of counsel in the trial court with lack of affective reply by opposing counsel, and thereupon resolves to shoot less often from the hip when time and circumstances do not require. But often he silently realizes the truth of the old adage: "A woman convinced against her will is of the same opinion still." And from my own experience I can say that if he has a close personal relation with the appellate judge, such silence is not eternal. Often have I heard one of my close friends, a district judge, say in passing, with all the implications which he can convey, "Well, I read where the House of Lords handed down some rulings the other day." (Laughter) .

Probably the philosophy of Judge Meekins of the Eastern District of North Carolina is the most comforting thought in the matter, as expressed by him in his opinion in *Hampton v. North Carolina Pulp Company,* in 49 F. Supp. 625. In an interesting and amusing discussion of fish he paused to remark:

"Oh, well, now, yes, of course, the Circuit Court gives me a lot of trouble. But 'hit ain't as bad as it mought be.' If I am not reversed in more than nine cases out of ten, I feel from fair to middling. And if I draw ten straight, that does not send me to bed as even one reversal does some of the gentlemen of the Bench, State and Federal, so I have heard. Nor do I waste time explaining how and wherein the Circuit Court 'got all balled up' and reversed me. That is

what Circuit Courts are for—to correct the mistakes of District Judges—otherwise there would have been no compelling need to justify their establishment, except the need to protect the Supreme Court against a deluge of appeals."

My story would not be complete when, having asked the question, "Why the Appeal?", I did not also ask the question, "Why the Petition for Rehearing?" That I will not try to answer, although I have had some experience in that branch of the law. With no intention of expressing any view in the matter, I can repeat the remarks of one lawyer to another as possibly reflecting the viewpoint of experienced lawyers. While visiting in the capital of a neighboring state, they attended a session of its court of last resort. One of them later remarked that he was surprised at the advanced age of one of the judges.

"Yes," replied the other, "he is probably too weak to even overrule a petition for rehearing." (Laughter)

I fear I have talked too long. Some of you may be trying to get a seat near the door so as to get out first, and with that thought in mind I will merely close with this little story I heard the other day:

It so happened that two prisoners were turned in to the penitentiary one day at exactly the same time and the warden put them both in the same cell. One of them looked at the other and said, "How long are you in here for?"

He said, "Seventy-five years. How long are you in for?"

The first one said, "A hundred years." After quite a pause, the first one said, "You take the cot nearest the door. You will be getting out first."

A Look At The Courts In Canada*

HONORABLE G. A. GALE**
Toronto, Canada

PRESIDENT LESTER P. DODD: This is an international association. We are sometimes prone to forget that because the members from our own country at least outnumber those from other countries, but in keeping with the international character of our organization it is a very real pleasure to have with us this morning as our principal speaker at this session a member of the judiciary of our neighboring country, Canada.

I come from a border state myself and so I am in much closer touch, perhaps, with the Canadian Bar than any of you who come from other parts of this country. I assure you that they are a group of whom we may be proud to have the able representatives that we have in this organization.

I first came to know Justice Gale—incidentally, familiarly and affectionately known to all his friends as Bill. I don't know why. His name isn't William, it is G. A., but everybody knows him as "Bill" Gale. I had the pleasure of knowing him first a few years ago when he and his charming wife, Hilda, came over to the meeting of my State Bar of Michigan, and by their cordial friendliness they endeared themselves to our bar and today I believe that Bill and Hilda Gale have as many friends in the bar of the State of Michigan as I have—maybe more.

I have no idea as to the content of his address this morning, but I do know that I am about to present to you one of the most charming individuals that I have ever had the pleasure of knowing, or that we have ever had the privilege of bringing as our guest here.

It is my real personal and official privilege to present to you Justice G. A. Gale, Justice of the Supreme Court of Ontario, Toronto, Canada. Justice Gale!

(Mr. Justice Gale received a standing ovation.)

THE HONORABLE G. A. GALE: The only thing that Lester neglected to say in his introduction is that we are now resuming the Amateur Hour. I think that

*Address delivered at the Twenty-ninth Annual Convention of the International Association of Insurance Counsel, at The Greenbrier, July 14, 1956.

**Justice of the Supreme Court of Ontario.

I am the person who should be here, but from that introduction I would never know it. In fact, just as it ended I caught a glimpse of Hilda and she was looking at me as if I were a perfect stranger. Of course she has done that on previous occasions—as recently as the night before last—but not for the same reason. (Laughter)

Lester, I do want to thank you heartily for your gracious introduction. It is very nice to be made to feel important; it is a wonderful sensation, even though not deserved. Of course, importance is a relative matter. Not long ago there was a large funeral in Toronto and two spectators watched the event with some interest. One said to his neighbor, "This must be the funeral of a very important man. I wonder whose it is?"

His companion replied, "Why, I don't know, but I rather imagine that it is the person under the flowers." (Laughter)

I should also, Lester, like to thank you and your associates for having accorded me the privilege and honor of being with you here today and to express most sincerely our thanks for the soft, enveloping hospitality which has literally been thrown around Hilda and myself since we arrived. I can't believe it is all personal. I suspect perhaps that it is because we are a couple of foreigners and that you have accordingly decided to extend your notorious sense of hospitality to us.

On Tuesday last it was not easy to leave the cooling and wooded shores of the upper part of Lake Huron, but how fortunate it was that we were able to do so! It would have been a tragedy to have missed the attractions of this incomparable place and the friendliness which has been ours since our arrival. Indeed, I am sure that it is a quality of friendship which will endure beyond the close of this meeting.

I cannot do anything for Governor Marland beyond subscribing to his understatements concerning this establishment, which provides so much for the outer eye and so much, too, for the inner man.

There was no question but that Hilda was going to come with me. She now accompanies me on most trips that I take after an unfortunate mistake which was made on one occasion by an incompetent telegrapher. I was on a delightful trip—I won't otherwise describe it—and made the ghastly error of deciding that I should send a wire home—don't ever do that. It is unwise. (Laughter). I was in such humour that all I could think of was the commonplace message of: "Having a wonderful time. Wish you were here.' Unfortunately, my enemy, the telegrapher left off the final "e". (Laughter) Since then Hilda has displayed a remarkable willingness to accompany me on any trips that I take.

Before stumbling on to my alleged address, I would like to return once again to a topic I touched lightly upon a moment ago. Your invitation, of course, assured a reasonably warm welcome, for I have come to know, as typified by my trip to Michigan several years ago, that by and large Canadians are graciously received in this great country of yours—and that is not really very surprising in view of the amicable relations that exist between our two peoples and particularly between our two Bars—but quite frankly, I was entirely unprepared for the range of hospitality and the sincerity of greetings that has been ours since we arrived at The Greenbrier. It has been an exhilirating and unforgettable experience. We have met so many congenial people. and have had such a wonderful time, that I just simply do not understand how The Greenbrier became the locale of that famous dialogue between the governors of two near-by adjoining states. That is quite incredible to me. Obviously there just could not have been any Humbugs around. (Laughter)

In that connection, I reminded Phil Schneider of the story whereupon he declared, "Well, of course in my State, we have drinks between drinks."

Pat Eager immediately countered, "In my State there is no such interval." (Laughter)

I am so overcome with the welcome and friendship that we have had here, that I am almost inclined, but not quite, to support the candidacy of Henry Krajewski, a tavern keeper of Syracuse, New York, who, according to an April issue of Time Magazine, has just embarked upon his second consecutive bid for the presidency of the United States. He does not play second base for the Cincinnati Red Legs, and Tiny Gooch has asked me

to assure you that he did not attend his convention. Mr. Krajewski has, as the main plank in his 1956 campaign platform, the annexation of Canada.

Incidentally, some people were surprised, I rather gathered, to hear that Mr. Gooch had been selected to attend the two great forthcoming conventions. That did not startle me. I think he is large enough to attend the two meetings even if held at the same time. (Laughter)

Yours is, happily, an international organization and I should like to echo Lester's statements about the caliber of your members from Canada. And perhaps I may be so bold as to express on their behalf the feeling of warm good will that prevails between the Bar of Canada and the Bar of the United States. I am afraid that all the nice things that can be said upon that subject have been said by much more skillful tongues than mine. But nevertheless, in spite of the many after-dinner speeches, and the beatitudes and platitudes, I can be pardoned if, forgetting the little things which occasionally divide us, you will allow me to remind you that we are both dedicated to identical concepts of law and justice and peace and freedom.

Even a judge, so-called, no matter how much he may ramble, must ultimately come to his subject, and I find myself in that predicament. Four months ago I received from Walter Humkey, an invitation to speak, and, as you know, there is always a flattering appeal to one's vanity —at least to mine—to be asked to do that. Of course I accepted, because four months ago it seemed the easy thing to do. Up in Canada there is a saying that if you want to have a really short winter you should just sign a six months' note in the Fall. (Laughter)

My days of grace have elapsed and the bill is now being presented for payment. And I am in trouble. You will be relieved to learn that I am not going to speak on insurance. I resolved that I would not do that, because I knew that I would be in difficulties from the moment I started.

The subject I have selected will probably be completely boring to the ladies in the audience, but that is just their bad luck. Their lot is something like that of the hardened criminal who, having spent most of his days in and out of jails and prisons, was caught engaging in a little armed robbery. When the wise man on the Bench—I like that description—examined his record, he decided to put an end to this man's peregrinations. Accordingly, he ordered life imprisonment. The old criminal, when he heard the sentence, was aghast. He said, "But, Judge, that's awful. That's a terrible sentence. I can't possibly serve that."

Whereupon the judge replied, "I understand. It is severe, isn't it? You just serve as much of it as you can." (Laughter)

I sincerely hope that you haven't expected a scholarly discourse replete with copious quotations. If so, you are doomed to disappointment. As I said a few moments ago, the topic of my discussion gave me considerable anxiety because I was conscious of the fact that today the American political and social scene is unusually active and at all costs I wished to avoid giving the impression of partiality. My fears, of course, in respect of the political struggle were quite groundless, for even the Governor adopted an air of complete impartiality and it is quite apparent, at this meeting at any rate, that the Republicans and the Democrats have exemplified the occasional, if rare, combination of the lion and the lamb. In that regard I remember a story of a showman in Lonlon whose main and arresting exhibit was that of a lion and a lamb in the one cage. One of his competitors was intrigued by this and asked him, "How in the world do you manage this exhibit, Jack?"

The reply was, "By frequent renewals of lamb." (Laughter) Now, don't ask me which is the lion and the lamb here.

With some misgivings, particularly as I could not know just who would be in the audience, I decided to speak about the Canadian courts, not in a boastful way, although I think it is not wrong for me to say that in Canada we are justifiably proud of the way in which justice is administered, but rather because I thought that perhaps on some future occasion you might find it to your advantage to have an outline of our judicial pattern.

For some considerable time past our two countries and our two peoples, have been so closely integrated in all our affairs, both business and—fortunately—pleasure, that it is conceivable that you might be interested in acquiring some knowledge of the courts in my country. It is my

conviction, for example, that international legal problems are bound to arise, and indeed are now arising, from the construction of the St. Lawrence Seaway and that all of you will have more and more occasion to look at the Canadian scene.

For that reason alone I came to the conclusion that you might be willing to listen to me for just a very few minutes while I describe one phase of it.

As you all know, the British Common Law is the basic law of all the provinces of Canada save Quebec, where a Civil Code, based upon the old Napoleonic Code is in force. Apart from that, the British Common Law is the basic law of Canada. On the other hand, the criminal law—I was speaking of the civil law before—the criminal law and criminal procedure, are prescribed by what is known as the Criminal Code, which is a statute introduced by the Dominion first in 1892 and recently overhauled. It is applicable to all provinces including Quebec. It, too, was drawn substantially from the British Common Law and since its inception has done a grand job.

In that connection I had occasion not long back to study those sections of the proposed American Criminal Code which had been drafted and found them intensely interesting. It is presumptious, of course, for me to say this, and perhaps very few of you here are concerned with criminal law, but I do hope that before the very distinguished panel set up to draft your Code finishes its deliberations some of its members confer with someone in Canada who has had the benefit of deep experience with our Criminal Code. I think assistance might be provided if that is done.

Under the British North America Act of 1867, Canada was created, and the legislative powers covering the whole field of self-government were distributed between the Federal and the Provincial Governments. In other words, specific areas of jurisdiction were given either to the Provincial Governments or to the Federal Government, and if any subject was left unassigned it fell under the exclusive authority of the Dominion.

One of the matters expressly given to the provinces was the administration of justice in respect of both civil and criminal proceedings. Under another section of the Act, however, the Dominion Government was made responsible for the appointment and remuneration all judges. Accordingly, in our country, the provinces have constituted and organized and maintained the courts, which are presided over by judges appointed and paid by the Federal Government.

The Parliament of Canada was given the further right to create a general Court of Appeal for Canada and to establish any other courts which might be thought necessary to administer the laws of Canada, that is, the laws in respect of matters over which the Govenment of Canada has exclusive jurisdiction. By virtue of that prerogative Parliament established the Supreme Court of Canada and the Exchequer Court.

The former is a general Court of Appeal for the whole of the Dominion and since appeals to the Privy Council have been abolished that tribunal, like your Supreme Court of the United States, now enjoys exclusive ultimate appellate jurisdiction, civil and criminal, and its judgments are final and conclusive. While special matters may also, be statute, be entertained by that Court, generally speaking, it only hears appeals from final judgments of the highest courts of the provinces where the amounts involved exceed $2,000 or in proceedings in the nature of habeas corpus or mandamus, and appeals from the Exchequer Court. In other circumstances, leave to appeal may be granted by the Supreme Court of Canada or by the court from which the appeal is sought to be taken. In this regard, there is a little story told of a lawyer from the northern part of Quebec who, having lost consistently in the provincial courts, decided that he could only get justice from the Supreme Court of Canada. Of course, his case had no right to be there—and when he was called upon, the Chief Justice of Canada, who came from Quebec, asked him, "How did you get here?"

Our intrepid counsel replied at once, "Why, my Lord, by the Canadian Pacific Railway, of course."

The Supreme Court conducts its hearings only in Ottawa. It is composed of a Chief Justice and eight puisne Justices. By law, three of those appointees must come from the Bar or Bench of Quebec. By custom, three are appointed from the Province of Ontario, two from the Western Provinces and one from the Maritime Provinces.

The functions of the other court that I have just mentioned, the Exchequer Court, are not susceptible of any short explanation. Pursuant to the power bestowed upon it by the B. N. A. Act, the Parliament of Canada set this court up for the purpose of disposing of civil matters in which the Crown in the right of the Dominion is a party; of litigation, rarely generated, relating to interprovincial railways; of cases respecting Dominion revenue; and of specified controversies between Canada and its provinces. The Court has also been given jursdiction—and this is important—as between subject and subject with respect to patents, copyrights, trademarks and industrial designs, all of which are Dominion matters. It also hears appeals from certain Federal Boards and is the Admiralty Court for Canada. It is composed of a President and five puisne Judges, who sit anywhere in Canada according to the need. In addition, there is a local Admiralty judge in each Province, usually a member of the Supreme Court of that Province, to deal with local issues.

Those are the only two Dominion or Federal courts. I now turn briefly to the provincial courts, and while Ontario will be my guide, the courts in other provinces, though in some instances different in name and composition, generally exercise functions similar to the courts of Ontario.

The Supreme Court of Ontario is the highest court of my province. And mark this: it is clothed with all the powers formerly possessed by the Courts of Queen's Bench, Chancery, Exchequer, and Common Pleas and it is safe to say that its common law jurisdiction is deemed to exist unless ousted by statutory words which are clear and explicit. That is a most important contribution to the expedition of litigation in Ontario for our Court may grant all such remedies as to which any of the parties may be entitled in respect of any and every legal and equitable claim in order that all matters in controversy may be completely and finally determined and disposed of in that court.

It is divided into two divisions, the Court of Appeal and what is termed the High Court of Justice. The latter is the trial court. The former, the Court of Appeal, is composed of the Chief Justice of Ontario and nine other judges, and it exercises appellate jurisdiction in respect of all judgments, orders and verdicts of the other Ontario courts. We fondly refer to it as "the Court of intermediate conjecture". The High Court of Justice, on which there is a Chief Justice and eighteen other members, of which I am one, is the senior trial court for the province. We preside over the trials of serious criminal cases such as murder or manslaughter, rape, and conspiracy, and over all civil matters not expressly entrusted by statute to the lower courts. The judges of my Court sally forth from Toronto to conduct Assizes in county towns located throughout the entire area of the Province of Ontario, which, incidentally, is a very big province—I won't argue with Tiny Gooch as to whether it is bigger than Texas or not, but it is a fairly good sized province—in very much the same way as has been done for centuries in the Old Country under its venerable Circuit Court system. Actually, there is very little to distinguish in form or content between an English Assize and an Ontario Assize. We wear robes—and it must be very difficult for some of you who saw me cavorting about the dance floor two nights ago to imagine me dressed up in a wing collar and tabs and wearing a purple robe with pink sleeves to commemorate the death of Christ, a black silk surplice and belt and a scarlet gun case, used originally to deposit their guns by judges riding on horseback from Assize town to Assize town in England.

Those robes have been worn in the Trinity term in England since about 1270. Like our forbears, of course, we are lovers of tradition. The only thing that we have discarded are the wigs. I am not too sure that that was a good idea. Some of us, I suspect, would look better with them.

I remember a story of an incident that occurred in Cochrane. A litigant was there for the first time at the opening of court. When the first recess was called he turned to his counsel and he said. "Goodness, I didn't know that the Court was going to be opened by the Bishop of Moosonee." (Laughter). It is a very colorful robe.

All judges in Canada wear robes of one kind or another, and wing collars and tabs. Most appellate courts use the silk King's Counsel robe. All Canadian counsel similarly must have on wing collars, tabs and gowns.

The Assizes that I attend sometimes provide most interesting experiences. It is

a general custom, for example, to always present the presiding judge with a pair of white kid gloves if no serious criminal cases are on the docket to indicate the purity of that county or district since the last visit of the judge and in Cochrane, on the opening night of every Assize there is conducted what is called the Jurors' Dance. It is said to be a very lively affair. I don't know whether the recent inclusion in Ontario of ladies of the jury will cause its extinction. Heretofore it has been a delightful event. I have never attended it, but I have heard rumours of it.

Those are, for example, two of the features of the Circuit system, which is altogether pleasant. It brings to the layman and the lawyer alike a consciousness of the great inheritance of the Common Law and the tradition of which I have spoken, and, of course, it presents many lighter moments, too.

Perhaps you will bear with me if I tell you several of the little incidents that have occurred on Assize. I will never forget when, four or five years ago in Welland, Dinny Mahagen was tried for murder and I presided. Dinny had got into an argument with one of his friends after drinking approximately three bottles of wine and two bottles of beer. A fight ensued which he won by using a stone after his fists had failed. The deceased, Mr. Morrison, more informally known as "Floppy" Morrison because of his lack of skill in the prize ring, had acquired some small boxing ability, and Dinny came to the correct conclusion that a stone was the only way he was ever going to win that fight.

He decided to tidy up the little shack by putting the body in a quarry which was half full of water or ice—it was very cold just then, the event taking place in December—and then went to the police station. According to the evidence the following conversation took place: "Good morning, Sergeant."

"Good morning, Dinny."

"Sergeant, I just killed a guy."

"Oh," the sergeant said, "it is cold out, of course, but you know we will always book you for vagrancy. You can get a bed here. You don't have to come around with a story like that."

"Honest to God, Sergeant, I killed a guy."

"Now," he said, "Dinny, we have always been kind to you. We have put you up here. There is no need to resort to these sort of tactics."

"Honest to God, Sergeant, I killed a guy. I threw him in the quarry. If you don't get out there pretty fast, he is going to drown. " (Laughter)

Well, the sergeant's patience was lost at that point and he said, "Now, look here, Dinny, we have always been friendly to you. We have treated you well and there is absolutely no need for your coming in with a cock-and-bull story like that. I'm through. I'm angry. You can be charged with creating a public nuisance by doing a thing like this. I am going out to that quarry, and if I don't find a body you are going to be in trouble." (Laughter)

Fortunately for Dinny, he found a body and he was only charged with murder. (Laughter)

I think I should not end without saying that he was found guilty of manslaughter only, which was a proper verdict having regard to his state of drunkenness, and was given a few years in which to take treatment for that particular disease.

Then there was the occasion when I was travelling to Haileybury, which is up in northern Ontario and proceeded, with my reporter who accompanies me, into the dining car. At the only table with empty chairs was a very vivacious lady who reminded me somewhat of Betty Hutton—she was about that type of introvert (laughter)—and in no time at all she had disclosed to us, without any invitation, of course, that she was going up to Haileybury to attend her trial for divorce. At some length she went on to explain what a very smart lawyer she had because while normally she couldn't bring the action there, he had fixed it so that the action was to be tried in Haileybury in order to expedite her freedom. She even offered me—and gave me —the name of the lawyer in case I ever needed (laughter) a good, smart man who could do those sort of things. About that time dinner had reached her and she looked around and saw that I was dressed rather differently from most of the passengers on northern trains, and said, "What do you do?"

I said, "I work for the Government." (Laughter)

Then she said to my reporter, "What do you do."

"Oh," he said, "I work for the Government, too."

"Oh. Where are you going?"

"To Haileybury."

"What are you going to do up there?"

"Well," I said, "when the Government has certain business in Haileybury sometimes they want me to be there.'

She then paused for a long time and next asked my reporter "He wouldn't be the judge, would he?" (Laughter)

The reporter nodded his head.

Then she said, "Of course, they have two judges in Haileybury, don't they?"

The reporter shook his head.

"My God," she said, "for three dollars I buy a steak and now I can't eat it," (Laughter)

Exactly three weeks ago today I was in Cochrane again—I don't know why so many stories take me back to Cochrane except that it is very far north, about 73 miles, I believe, from part of Hudson Bay —and the sheriff invited me to go for a little ride with him in the evening. During the course of the drive we stood within about 20 feet of a beaver on the side of a creek munching his dinner, we crossed the Abitibi River, which flows into the Arctic Ocean—that was the first occasion on which I had ever been near a river flowing in that direction—later we followed a huge bear ambling along the road, and then saw a moose standing in a small lake. That is the sort of experience you have as a trial judge on Assize in Ontario. It was a thrilling evening for me. Of course, the sheriff later confessed that I had managed to see more wild life on that trip than most of the inhabitants of Cochrane had ever seen or would ever see in their lives.

When I related the incident at home and said that I might mention it here, my 17-year-old son was simply aghast. He said, "For heaven's sake don't do that. It will just confirm the impression that the Americans have that we are still pioneers up here." Well, I have told it and all I can say in rebuttal is that while wild life abounds in many parts of the province, metropolitan Toronto now has a population of over 1¼ million people who are reputed to own more Cadillacs per capita than those of any other city on the North American continent and who certainly have produced the world's greatest traffic headache. (laughter). And when I return home I am going to be able to tell my son that all the wild life is not confined to Ontario (laughter) and that even at The Greenbrier I saw a fair number of Indians.

Of course, trial judges also hear some delightful answers from witnesses. I will just mention two that were given this year:

It is necessary to prove in a divorce action in Ontario that the marriage was valid, so that one of the questions normally put is: "At the time of this marriage, what was your marital status?"

In Pembroke a female plaintiff answered: "Pregnant." (laughter)

Since that day I have suggested to counsel that a safer question is, "Have you or your husband ever been married before?" (Laughter)

At a trial for rape in Toronto, the girl was one of the prettiest and yet one of the dumbest blondes that I think I ever saw in my life. Her dumbness was the type portrayed by Judy Holliday in "Born Yesterday", and she had the jury and myself almost in fits with most of her answers. The classic one that I remember, however, came in this way: six of them, three couples, had gone out to a place called Cherry Beach in the east end of Toronto and parked the car. For selfish purposes the couples had separated (laughter) and the cunning defense counsel in cross-examining the complainant, who alleged that indelicate things had gone on, for the purpose of showing that consent was an ingredient in the affair, diabolically asked in a very winning way, "And you went along the beach to this particular little spot?"

"Yes."

"And I suppose" he said, "you found solitude there?"

She paused for a long time and finally replied,

"No, he wasn't there." (Laughter)

May I be so presumptuous as to suggest that if you are ever in an Ontario county or district town while the Assize is going on, that you take a few minutes off to drop in. I believe you will find it an interesting experience.

I have dealt with two Federal courts and our provincial Supreme Court. The County Courts are next in our judicial scale. All provinces are divided into

counties or districts, and for each county or district, depending on the volume of business, there is a county court judge, or more than one county court judge. The jurisdiction of these county courts is carefully and plainly set forth in the statute which gives them life. I cannot over emphasize that point. I think it will suffice for me to say that generally speaking they possess jurisdiction to try cases arising out of contract if the claim does not exceed $1,200 in amount and in cases of tort if less than $1,000 is asked. You can, however, commence an action in the county court and claim more than the jurisdictional limits and it will be tried there unless the defendant disputes the jurisdiction. If he does, then the case is automatically transferred to our court.

These judges, the judges of the county courts, have wide authority in criminal matters and they try all the cases of a criminal nature which do not come before us or before the magistrates. They possess no jurisdiction to dissolve marriages. That power, by reason of a section of the British North America Act, is, vested solely in the provincial Supreme Courts.

In this connection perhaps I should also mention that in Newfoundland and in Quebec there is no jurisdiction for granting divorces. Persons who wish to untie their unhappy bonds must go to the Senate of Canada and appear before a Select Committee of that body to obtain relief.

Then we have the Division Courts. which are the small-debt courts, and are presided over by the County Court judges.

We also have a Surrogate Court, for each county. These are provincial courts with no inherent jurisdiction whatever. They deal only with matters touching the estates of deceased persons and in that sphere they grant letters of probate and administration, settle contested claims, pass accounts and fix compensation. Invariably they are presided over by the county court judges. In some circumstances contested issues may be removed into our court. One instance comes to my mind that perhaps you will permit me to relate. It took place not long back in London, Ontario, where your friend George Mitchell practices.

We have a notorious and lovable counsel—I won't tell you his name—who is short and quick of movement and who at all times is particularly interested in the question of costs. In Canada we do not receive fees on an contingent basis. Indeed, for counsel or anybody to enter into an agreement such as the one that Mr. Weston made with "Danny" would call for his disbarment. On the other hand the successful litigant is usually given the right to tax substantial costs against the other side or out of the estate which is the subject matter of the contest, and this particular counsel is always alert when the question of costs comes to be decided.

The case I have in mind involved an estate. The learned trial judge suggested—and that is frequently done before the trial commences—that the counsel sit down to see if they could not resolve their difficulties. Counsel proceeded to another room and our friend took the head of the head of the table. I am told—I wasn't there—that he opened the discussion in this way—"Now, boys"—there were present just the solicitors and counsel—"Now, boys, before we commence our deliberations I feel that I should remind you that as lawyers we have the duty to see to it that this estate is not frittered away by the heirs." (Laughter)

There is another story told about him. He was trying a case in St. Thomas involving a very unfortunate accident. Two boys were out hunting rabbits and one of the boys shot the other in the eye. Our friend was for the plaintiff and he was doing a grand job before the jury. He was re-enacting the hunt and in doing so was running from side to side and shooting and standing behind a tree—all the things that one would only do if one were on a hunt with him. (Laughter). All of a sudden the trial Judge, Mr. Justice Makins said, "Stop, Mr. X." (That just about froze him in mid-air). (Laughter).

"I am all confused," the judge stated, "and I am afraid the jury may be con fused too". He continued, "At this precise moment are you the boy with the gun, or are you the lad who was shot, or are you the rabbit?" (Laughter)

The last tribunal in Ontario which I certainly must not overlook are the Magistrates Courts. They discharge most onerous and valuable duties in trying a multitude of petty offenses assigned to them by the Criminal Code and other statutes. Those who preside, now largely lawyers, are appointed and paid by the province.

The judges of the provincial Supreme Courts are appointed for life, but we have the right to retire at age 75 or after serving 15 years whichever is the sooner.

The judges of the Supreme Court of Canada and the county court judges are appointed for life but are required to leave the Bench when they attain the age of 75 years.

There you have a brief outline of all the courts which affect the citizens of Ontario. You will note that our courts are readily comprehended and are relatively few in number. The Supreme Court of Canada is the court of final resort and the Division or Small Debts Court and the Magistrates are at the other end of the scale. In between there is the Court of Appeal for Ontario, the High Court of Justice or Trial Court, and the County Courts.

You may be inclined to think that I have oversimplified it, but that is not so. We have found that the system has worked very well, simplified as it is. In other words, if you have any litigation which is not specifically and expressly provided for in the County Courts Act or in the Division Courts Act then your action must be commenced in the Supreme Court of Ontario.

The authority of that Court, therefore, is so wide and the jurisdiction of the lower courts so plainly set out that seldom are we troubled with inter-tribunal problems.

Perhaps a brief word about our practice might not be resented. Actually it is very much like that which for three-quarters of a century has prevailed in England. All actions are commenced by writs of summons followed by statements of claim, statements of defense or statements of defense and counterclaim and sometimes by replies.

We have compulsory examinations for discovery at which time the parties are required to divulge all information, knowledge and belief concerning the suit. Such examinations are most helpful—I know many of the states here have them too—because the answers which are given may be read in as part of the evidence at trial.

We do not have pre-trial. So far, speaking only for myself, I can see no need for it in Ontario. We do have methods of expediting trials that seem to work, and by and large our trials do not consume an inordinate length of time. I watched with great interest the panel yesterday. The only thing that I thought rather unfair was that the poor judge was the only one who did not seem to have anybody with whom to confer. (Laughter). The home office expert and Danny were there, but the unfortunate trial judge was left all alone. And it might have been very interesting had he been provided with an associate for we could have listened to the conversation that passed between them. I fancy that their remarks concerning both counsel might have been rather revealing. (Laughter)

Some criminal trials in Canada, may, at the election of the accused, be heard by a judge alone, but the majority are tried by juries of twelve.

On the other hand, in several provinces including Ontario, fewer sit as jurors on civil cases. In Ontario six jurors are present. However, I wish to make it very clear that non-jury civil trials outnumber considerably those at which juries are in attendance, and I can also add without any hesitation that today I think the trend is away from civil trials with juries. I will not attempt to assign the cause except to say judges now seem to award as much if not more in the way of damages. I think I can also say with confidence that it is my impression that we have for more non-jury actions in damage cases than you do here. I fancy that counsel for the plaintiff in Danny's case would have served a jury notice in Ontario, but it would be by no means certain that that jury notice would not have been struck out by the court because of some of the unusual issues in that particular action.

One significant difference in our respective procedures of which I have some knowledge is that in our jurisdiction a witness is subjected only to an examination-in-chief by his own counsel, a cross-examination by his adversary's counsel and a re-examination by the former, confined to matters raised in the cross-examination. That was brought most forcibly to my attention when I took some evidence in Syracuse. I was the only Canadian there. I conducted my examination-in-chief of the first and most important witness, my opponent cross-examined and I tidied the thing up just beautifully in my re-examination. To my horror, my enemy then started to open the whole thing up on—I don't know what you call

it, a re-examination or something of that sort—and undid all the good that I thought I had so nicely achieved. I believe our system does expedite the trial. We examine-in-chief, cross-examine and then re-examine, but only on matters raised in the course of the cross-examination.

Similarly a plaintiff's case cannot be broken up. He must introduce all his evidence when his case is going in. After the defense is heard the plaintiff can introduce further evidence, but only on matters raised by the defense. He is not permitted to adduce anything new in support of his own case.

Both of those features have the desirable effect of tending to keep the trial within proper bounds as far as time is concerned.

The mention of time reminds me that you are all anxious to know who has been nominated as officers for next year and I must vacate this very distinguished place. Undoubtedly, I have trespassed on your notorious good nature much like another speaker who, upon sitting down turned to his neighbor and said: "I am afraid I spoke too long."

The reply was: "Oh, no. It may only be that it seemed too long." (Laughter)

Another devastating rejoinder was made by a Chief Justice of Ontario, a venerable man who lived to be 100 years of age—he retired from the Bench, with all of his faculties unimpaired when he was 98—who, upon being shown an opinion drafted by a fellow judge, gave qualified approval to the judgment, but said, "Much too long. Much too long. Cut out half of it. It is immaterial which half." (Laughter)

I have dared to usurp so much of your time for the single purpose of attempting to give you some small measure of insight into one of our most revered institutions, the administration of justice. You do not need any reassurance from me that up in Canada we have a deeply-rooted and cherished respect for the application of legal principles. We know that the supreme test of any civilized society lies not only in its esteem for the law itself but also in its just and inflexible administration. We all have witnessed the fate which overtakes a nation when the rule of law is abandoned and justice is denied. The age of tyranny and disorder begins; the security of the citizen disappears; the essential freedoms are lost and fear invades the land. I repeat that you hardly require any affirmation from me that in my country the nobility of the law is universally appreciated and honored. But it was my thought that by describing briefly the media by which its beneficence is made available to our citizens I might impress you with the efficacy and integrity of our methods of administration and if I have done so, then the cause of understanding and good will which flourishes between us will have been served.

And now, Lester, let me end as I began, by thanking you and all those here who have been so wonderfully kind to Mrs. Gale and myself. It has been said that when a large tree is brought down there can be seen the great rings in the trunk which indicate the stages of growth in that tree's life. And so it is, Mr. President, that in our short lives there are great moments and great occasions that leave their ineffaceable mark. For us this visit to Greenbrier and the friendship with which we have been showered is such a one.

Perhaps you will indulge me for one minute more. When the Coronation of our lovely Queen was celebrated several years ago I heard for the first time the prayer with which the Archbishops of Canterbury always conclude the Service. It left and indelible impression upon my mind and upon my heart and I would like to offer to you the wishes it contains. When the Archbishop speaks of Her Majesty's Government, of her citizens and of the Clergy, will you please read into his words a prayer for the legislators and peoples and ministers and priests and rabbis of your own glorious land. This is the prayer:

"The Lord give you faithful Parliaments and quiet Realms; sure defense against all enemies; fruitful lands and a prosperous industry; wise counsellors and upright magistrates; leaders of integrity in learning and labour; a devout, learned and useful clergy; honest peaceable and dutiful citizens.

"May Wisdom and Knowledge be the Stability of your Times, and the Fear of the Lord your Treasure."

INTERESTING READING*

Suggested by

MILLER MANIER**
Nashville, Tennessee

ELECTROCUTION FROM TV ANTENNA CONNECTION WITH POWER LINE NOT TORTIOUS

Jowett v. Pennsylvania Power Co., Pa., 118 A. 2d 452.

The Supreme Court of Pennsylvania has freed a power company from liability in the death of one who was electrocuted when the television antenna which he was repairing came into contact with a high voltage line of the power company. It had been contended that the company had been negligent in failing to warn of the dangerous nature of the overhead wires. The supreme court, in an opinion by Horace Stern, Chief Justice, agreed with the lower court that the company owed no duty to give such a warning. It said that while a company may have been bound to take into consideration the possibility that the antenna might through some natural cause or agency come into contact with its wires, it was not obliged to anticipate that human intervention, aided by the existence of a careless defective coupling in the antenna, which snapped during the repair operations, would bring about such an accident. The court added that the actual and proximate cause of the accident was the defective coupling. Musmanno, J., dissented on the ground that the failure of the company to give notice of danger was the actual and proximate cause of the accident.

MEDICAL DEFINITION OF HERNIA GOVERNS INTERPRETATION OF HEALTH POLICY

Seguin v. Continental Service Life & Health Ins. Co., La. App., 83 So.2d 789.

Reversing its position on rehearing, the Court of Appeal of Louisiana has announced that the meaning of the word "hernia" within a health and accident policy must be determined by reference to experts in the medical profession, rather than to the popular connotation.

The policy excluded coverage during the first year for specified conditions including hernia. Within that period the insured suffered a diaphragmatic hernia. This condition consists of a projection of the stomach into the thoracic cavity through the opening in the diaphragm normally occupied by the esophagus. On first thought the court believed that the words used in the contract were to be interpreted in the ordinary and general sense, rather than in any specialized or extremely technical meaning. Judge Tate persisted in this opinion on rehearing. However, on reconsideration the majority of the court relied upon provisions of the Civil Code requiring technical phrases to be interpreted according to their meaning within the profession to which they belong. Opinion by Lottinger, J.

ATOMIC TEST DAMAGE NOT UNDER TORT CLAIMS ACT

Bartholomae Corp. v. U.S., U.S.D.C.S.D. Cal.,135 F.Supp.651.

A property owner has failed in his efforts to recover from the United States government for damage allegedly caused by atomic energy and nuclear detonations at the Nevada Proving Grounds. Recovery was sought under the Federal Tort Claims Act and under the Fifth Amendment provision prohibiting the taking of property for public use without compensation.

The United States District Court for the Southern District of California, Byrne, J., upheld the government's contention that the provision of the Tort Claims Act, 28 U.S.C.A. §2680, retaining the government's

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immunity in regard to injuries occasioned through the performance of the discretionary function was applicable. The court said that the atomic testing program was authorized at the very highest level of government and that the decisions made in carrying out this plan were "precisely the type of function or duty which Congress did not intend to be actionable under the Tort Claims Act." The court disposed of the eminent domain theory by saying that, "a single isolated and unintentional act of the United States resulting in damage or destruction of property is not a taking in a constitutional sense."

SERVICE UNDER NONRESIDENT MOTORIST STATUTE DENIED

Langley v. Bunn, Ark., 284 S.W.2d 319.

A recent opinion of the Supreme Court of Arkansas points up the importance in the wording of the substituted service provisions of nonresident motorist statutes. The Arkansas statute authorizes substituted service upon the Secretary of State in any action growing out of an accident in which the nonresident might be involved while operating a motor vehicle "on such highway." A filling station attendant who was allegedly scalded while servicing an automobile of a nonresident motorist at a gasoline service station sought to avail himself of this provision. The court, Millwee, J., noted that the courts in jurisdictions with similar statutes had uniformly held that service thereunder was limited to actions involving accidents or collisions which occurred on the public highways and did not apply to accident occurring on private property. The court noted that certain jurisdictions had obviated this problem by authorizing substituted service in actions arising out of any accdent "in this State." The court concluded that under the present wording of the act, the service in the instant case was not valid.

NEGLIGENCE IN SIGNALLING FOLLOWING MOTORIST TO PASS

Shirley Cloak & Dress Co. v. Arnold, Ga. App., 90 S.E.2d 622.

The Court of Appeals of Georgia has had recent occasion to declare that a truck driver can be negligent in signaling a following motorist that the way ahead is clear to pass when in fact it is not. The petition alleged that plaintiff had followed defendant's truck for approximately 20 minutes over hill and dale and had been unable to pass because he could not determine whether the way ahead was clear. It was alleged that the truck driver signaled to plaintiff indicating that it was safe to pass and that plaintiff relied upon this signal. After pulling into the left lane, plaintiff saw that there was another truck ahead of defendant's truck and before he was able to pull back in line, he was involved in a head-on collision with an oncoming vehicle. Defendant's general demurrer to the petition was overruled and defendant brought error. The court of appeals, Carlisle, J., said, "While the defendant's driver was under no obligation to give the plaintiff any signal at all when he undertook to do so, a duty devolved upon him to exercise ordinary care to see that the way was clear ahead for the plaintiff's car to pass safely and whether he did so under the circumstances is a question for the jury's determination."

RES IPSA LOQUITUR— FALLING STEER

Guthrie v. Powell, Kan., 290 P.2d 834.

The applicability of the doctrine of res ipsa loquitur to an action for injuries sustained by a community sale patron when a steer broke through the ceiling and fell on plaintiff has been approved by the Supreme Court of Kansas. Defendants demurred on the grounds that they had no knowledge of the animal's peculiarities or its propensities, that the fact that a domestic animal escapes from custody is not so unusual as to warrant the application of the doctrine, as reasonable conclusions other than the negligence of defendants could be drawn to explain the occurrences, and that plaintiff had an equal opportunity to investigate and explain the occurrence and possessed the same knowledge as defendants in regard thereto. The trial court overruled the demurrers and the Supreme Court affirmed that judgment. Opinion by Harvey, C.J.

OPEN FORUM*

INJURIES TO THE BRAIN

RICHARD B. MONTGOMERY, *Chairman*
New Orleans, Louisiana

G. CAMERON BUCHANAN, *Vice Chairman*
Detroit, Michigan

PARTICIPANTS:

PLAINTIFF'S MEDICAL EXPERT—Dr. E. Stephen Gurdjian, Detroit, Michigan.

PLAINTIFF'S COUNSEL—George H. Cary, Detroit, Michigan.

DEFENDANT'S MEDICAL EXPERT—Dr. Dean H. Echols, New Orleans, Louisiana.

DEFENDANT'S COUNSEL—Charles L. Mayer, Shreveport, Louisiana.

CHAIRMAN MONTGOMERY: Ladies and gentlemen: This program is going to be a very informal one. We are going to discuss certain head injuries including concussion. We wish to set it up differently from the usual medical discussion. We wish to set it up so that it will be extemporaneous, although I would like to say that we have had about three rehearsals. [Laughter]

This is an imaginary situation. It is not an actual case. It is an attempt, however, to show how we should prepare a brain-injury case. What is to be discussed is the post-concussion syndrome where there has been no loss of consciousness.

Mr. Cary will be the plaintiff's attorney. Dr. Gurdjian, who is a very well recognized neurological surgeon, is going to represent the plaintiff's doctor. Mr. Charles Mayer will represent the defendant's attorney, and Dr. Dean Echols will be the defendant's doctor.

We selected these two doctors for the reason that they are outstanding in their sphere of work. Both are graduates of the University of Michigan Medical School. One is in charge of brain injuries at the Detroit Receiving Hospital, the other at the New Orleans Charity Hospital, which two hospitals probably treat the greatest number of concussions and other types of brain-injury cases in the United States.

Dr. Gurdjian is a professor at the Medical School of Wayne University. Dr. Echols occupies the same position at Tulane University. Dr. Echols is also head of the Neurosurgery Department of the Ochsner Clinic.

Now, we will start with Mr. Cary, who is of Detroit, and who is, of course, a member of our Association and well known to all of you. We will start with him having a supposed interview with his doctor. He wished me to say, and so did Mr. Mayer, that you must remember that this is an imaginary case setup and will not be conducted along the usual lines, but it is an attempt to have a panel discussion between the doctors and the lawyers so as to make it interesting and human and still have a thorough medical discussion of some very important developments in the field of neurosurgery.

I am now going to turn the panel discussion over to Mr. Cary.

MR. CARY: Dr. Gurdjian, we send a great many of these cases over to you for your careful but rather routine examination and I thought I should come over and talk to you personally today about this matter.

DR. GURDJIAN: What case are you talking about?

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MR. CARY: It is this case coming up for trial next week. I hate to tell you that, but it will be up, probably, in less than a week. How are you situated?

DR. GURDJIAN: Well, I think I can be there whenever needed. [Laughter]

MR. CARY: I assume that you aren't too pleased with the fact that this case will be up in less than a week, but I have to shape up your testimony a little bit because of some difficulty we are runing into.

DR. GURDJIAN: Well, don't try to shape it up to much, because it may not shape so well then. [Laughter]

MR. CARY: I have been trying to settle the case. As you know we don't get to trial much any more, but it looks like we would have to in this one.

Dr. Echols has entered this matter for the defense. Do you know him?

DR. GURDJIAN: Oh, yes. He is a very good neurological surgeon. I used to go to school with him many years ago.

MR. CARY: They tell me he has quite a reputation at Tulane University and he might make a rather strong witness.

DR. GURDJIAN: Yes, and I am almost positive that our testimonies will probably be about the same, even though we might be on the opposite sides of the case.

MR. CARY: Well, I hate to hear you say that. [Laughter] I hate to hear you say that because I am informed he thinks this man is malingering.

DR. GURDJIAN: Well, let him think that. I think that we have enough justification to say that the patient has a disability and he has been so disabled for about eighteen months, and I think that we can present our side of the problem satisfactorily.

MR. CARY: Well, now, from a factual viewpoint, which you didn't have when you examined the man, we do have evidence of a rather severe blow and contusion of his head but no unconsciousness. Would you give some thought to that feature of the case?

DR. GURDJIAN: Yes, in many instances there may be head injuries with aftereffects without necessarily an initial period of unconsciousness.

MR. CARY: This man is of the type that has a rather thick skull. [Laughter] I mean, in perhaps more ways than one.

DR. GURDJIAN: Well, I think you have hit on something rather important. The thickness and the shape of the skull are important as concerns the type of blow that may result in a fracture. The thicker and the more properly arched the skull, the less likelihood of a fracture, but one must also remember that whereas ordinarily it takes about 400-inch pounds of energy to cause a fracture of the skull, if a person can stand as much as 1000-inch pounds of energy without a fracture of the skull, he has more energy expended upon the head and contents. As will be shown a little later, there can be a great deal of damage to the contents without a fracture of the skull, and such an involvement can result in very serious after effects, both immediate as well as late.

MR. CARY: That is without doubt the best point we have made so far. Then regardless of any history of unconsciousness and no fracture, there can be a serious brain injury. Is that correct?

DR. GURDJIAN: There can be serious involvement of the contents of the head in a manner that may result in late effects in some instances and in immediate effects in others, as undoubtedly we will show a little later.

MR. CARY: We have in this case a so-called E.E.G.— how do you pronounce that word?

DR. GURDJIAN: Electroencephalogram. Another word is electrocorticogram that is, when the brain has been exposed and one records the electrical emanations from the brain directly.

MR. CARY: I believe in our history you found an abnormal electroencephalogram, particularly at the site of his supposed injury.

DR. GURDJIAN: The electroencephalogram in this particular patient showed some abnormalities in rhythm, as may be brought out a little later. The abnormalities in this case were generalized. They were not particularly located in one region alone and in order to have an electroencephalogram which is valuable from the standpoint of prognosis, or from the standpoint of telling how badly off a patient is, one should have serial electroencephalograms. By serial electroencephalograms we mean the recording of brain

waves every so often to see the changes that may occur in several electroencephalograms. I am sure that both doctors will agree that such serial electroencephalography will give more information than if we just take one record, say, a month, or two weeks, or one day after the injury and never have another record thereafter.

MR. CARY: In this case he had one at the hospital and then you took one in connection with your own examination, I believe.

DR. GURDJIAN: That's right.

MR. CARY: And Dr. Echols got at least one in between that you haven't seen, I believe.

DR. GURDJIAN: That is right. I think it would be interesting to know what has happened. As far as our own records are concerned, the changes that are present were the same throughout. I might tell you that when an abnormal electroencephalogram remains essentially the same throughout, say, over a period of several months, it is not as important a piece of evidence to show that there was a brain injury. Under these circumstances the abnormal electroencephalogram probably preceded the accident, and I think that is a rather important point to keep in mind.

MR. CARY: Then we are going to have to face the fact that when you compare these three electroencephalograms they may help us or even hurt us.

DR. GURDJIAN: Yes, and I think this is one very big difference between the way a physician studies a patient and the way you people study a client. You are always interested in winning your case. We are interested in merely presenting the material as we see it, and at times this difference of attitude gets us physicians into trouble because we are taught year in and year out, both in medical school as well as afterward that we are to describe what we see and let the chips fall where they may, and that, I think, is not the way you look at it. [Laughter]

MR. CARY: You make me feel as if I weren't too interested in the man getting well rapidly.

DR GURDJIAN: The thing that is rather important to keep in mind is that at times patients are kept from getting better because you people are interested in keeping up the disability, and I must tell you that a person who has a sick soul to start with, rather than a healthy soul, can very easily be influenced both by his complaints as well as by the comments made about him by lawyers and others, even those in his household. If we are to get these people cured, all of us have to work together for the purpose of the best type of rehabilitation.

MR. CARY: That does bring to mind this point, Doctor. We send these people to you for a routine examination, but it is important for you to recall that I have always told you that they are really patients of yours and subject to treatment if necessary. You understand that?

DR. GURDJIAN: Yes. Of course, but frequently the only reason they are sent to us is because you want certain information about the medical findings and also because you wish to have us testify in court.

MR. CARY: That is important. As a treating doctor you have more latitude than you would have as an examining physician, so we do want you to always feel that the man is your patient and not merely there for a report.

DR. GURDJIAN: Unfortunately in this particular patient's case, he said that he came here only for an examination and his doctor is taking care of him, his other doctor.

MR. CARY: Well, suppose we clear that up later. [Laughter]

Now I will have to qualify you with the usual questions as to your training and schooling. You understand that?

DR. GURDJIAN: Yes.

MR. CARY: I understand you have a very good background and that recently you have been asked to become a member of the Society of Neurological Surgeons. Is that correct?

DR. GURDJIAN: Yes, that's right.

MR. CARY: They will bring those matters up. You comment on some of the difficulties you have with attorneys in a book that you are writing at the present time. What is your suggestion to me in conducting this examination in court as to the approach I should take in bringing out the matters we have discussed here today.

DR. GURDJIAN: I think that it would be a good idea to have the case presented in an uninterrupted manner unless certain points might need further clarification or emphasis.

In this particular case, as I understand it, first our patient is negative for a fracture.

Second, the electroencephalogram was abnormal soon after the injured entered the hospital.

Third, this patient had not become unconscious from the blow on the head; and

Fourth, since the injury, he has complained of headaches, dizziness, some personality disorders—he thinks that he is unable to cerebrate as clearly as he used to—and these various complaints obtained in his history, are the basis for a diagnosis for post-traumatic cerebral syndrome, or a condition characterized by complaint following a head injury unassociated with skull fracture or unconsciousness, due to a subconcussive blow or a blow of a level, of a type, that is a little less than a concussive blow. A concussive blow is one that causes unconsciousness.

Now, as to how to emphasize his difficulties will depend upon what this fellow has done since his injury. Has he been able to work? In this particular case he has not been able to work satisfactorily. An important thing to bring out also is whether or not he was able to work satisfactorily before he was injured, and if there is a marked difference between pre-injury and after-injury behavior towards his work, why, that would be a very important point to emphasize in court.

This man probably does not have a subdural hematoma, or hemorrhage in the brain, as a result of a late effect of an injury. Every so often a person may be "conked" on the head, or hit on the head, he may not become unconscious, and about two and a half months later, may go unconscious due to the pressure of a clot on his brain. Such a clot in the brain may be initiated at the time of the injury two and a half or three months earlier. This man probably does not have a subdural hematoma, although if one wanted to be sure that such a thing were not present, then he should be in the hospital for some more studies including an arteriogram and an air encephalogram.

MR. CARY: What is an air encephalogram? I don't believe we have used that in any recent cases.

DR. GURDJIAN: An air encephalogram is a method of study. It is done by putting a needle in the lower part of the spine, removing the brain fluid, or the spinal fluid—all of us in this room each have about 90 to 150 cc's or about 5 ounces of this cerebrospinal fluid in our system—we remove this fluid and replace it with air, oxygen or helium. The air, being lighter, goes up to the head and fills the cavities of the brain. When an X-ray is obtained afterward, the X-rays show the shadows of the cavities of the brain. From that one can tell whether or not these cavities are compressed due to the presence of a tumor mass or a clot, or whether they are in their normal position. That is what we call an air encephalogram.

CHAIRMAN MONTGOMERY: George, I think you have spent all the money and time that an attorney could spend with a doctor, so now we are going to take up the defense doctor, but before we do that, I would like to say over again, for the benefit of those who have just come in, that this is an imaginary case which involves a post-concussion syndrome without unconsciousness, with the following facts only: that is, that the man suffered a blow on the head, he didn't become unconscious, he has an abnormal electroencephalogram, he has a post-concussion syndrome, and he has not worked in 18 months. This, as I say, is an attempt to have a very informal discussion. However, I don't think that lawyers would altogether handle a case in this manner if we had set up a real, true case with a definite statement of fact.

Now, Mr. Mayer, will you please take over?

MR. BUCHANAN: Dick, before you turn this over to Mr. Mayer, I would like to know how these plaintiff's lawyers get the doctors to sit down with them and spend this time. I have never been too successful.

George, would you tell us about that? [Addressing Mr. Cary]

MR. CARY: Well, they do get quite a little business from us in the course of a year [laughter], and, as a matter of fact, I rarely get more than 15 or 20

minutes. I think probably Dick was right when he said I had spent about all the time we would expect to get from the average doctor, in the prologue here.

MR. BUCHANAN: Well, are all these people out here patients waiting to see the doctor? [Laughter]

DR. GURDJIAN: Cam, may I say a word in that connection? We find, as practicing physicians in Detroit, that the plaintiff's lawyer gets after us in a manner that you almost have to give him time. The defense lawyers usually don't bother us very much. They send the patient over for an examination and, thereafter, they might call us if they did not understand some of the conclusions, and then we see them again, maybe, in court.

The plaintiff's lawyers seem to spend more time in preparing the case, and, of course, they certainly insist upon getting to see the physician. I think most of them can see the physician if they use the proper method and that is not to try to see him in the middle of the afternoon, but maybe toward the end of the afternoon, or in the beginning of the afternoon.

CHAIRMAN MONTGOMERY: Mr. Mayer, will you please take over?

MR. MAYER: Dr. Echols, as you know, we are confronted with the defense of this case involving a post-concussion syndrome and I certainly need some education in this matter before attempting to present our defense to a jury.

As a matter of general information, Doctor, do you confer with your lawyers prior to trial? That is, is it a general custom?

DR. DEAN H. ECHOLS: Mr. Mayer, I am very uncomfortable when I take part in a deposition or go into a court room if I haven't had a talk with the attorney who asked me to examine the patient. I somehow don't feel it is fair to me or to the client. My experience with this has been that dozens of times at a deposition I haven't met my attorney. I have been to court many times without having met the attorney, and that doesn't seem right.

In general, it seems to me that the plaintiffs' attorneys are the ones that call me up and ask me to meet them for lunch or ask if they can come to my house on Sunday morning– which I like because it keeps me from going to church [laughter]–and the defendants' attorneys–I don't know whether they don't prepare their cases as well, or–[laughter]

More recently it is my policy to call the attorney before we go to court and ask if we can't get together for a little while–and, incidentally the organization for which I work wants to be paid for that half-hour.

MR. MAYER: Well, Doctor, when is the most convenient time from your point of view for you to sit down and have a full discussion of a medical problem with the attorney? As far as you are concerned, what do you consider to be the most convenient time to go over the matter?

DR. ECHOLS: I find that my office isn't a good place for this. Surgeons spend a lot of time in hospitals and have limited time for office hours. Each week I allot four full hours to examining compensation cases, and take no more. That four hours is four hours gone out of a busy week.

I say the office isn't a good place to talk to a doctor because the attorney may have to wait as long as the rest of the patients, if the doctor is held up, so I have found in the last few years that the thing to do is for me to go to lunch with the attorney, or to dinner, or to ask him to drop by the house at seven-fifteen–I haven't got a television set, so I don't mind–

MR. MAYER: In other words, you would prefer for the attorney to interview you during somewhat of a more leisure time rather than during your regular business hours. Is that correct?

DR. ECHOLS: Yes.

MR. MAYER: Now, Doctor, coming to this particular case, as I said, I need considerable education. Just what is a post-concussion syndrome?

DR. ECHOLS: May I answer by saying something about concussion first?

MR. MAYER: Why, certainly. Any information that is pertinent is certainly what I need.

DR. ECHOLS: The true definition of concussion is that there is only a shaking-up of the brain and that if the patient dies on the same day from something else, the pathologist who examines the brain can find absolutely nothing wrong with it with the naked eye. Even though

the brain is cut into thin slices there is no evidence of swelling or hemorrhage; it looks like a normal brain.

Now, concussion is not just a bump on the head. It is a specific, definite thing, and to get concussion—the kind that occurs every day in auto accidents and other injuries—the head must either be moved rapidly or must come to a sudden stop against a solid object such as the pavement. That is called acceleration or deceleration concussion.

If you put a man down on the pavement and hold his head there and beat him on the head two or three times with a club, he does not lose consciousness because you haven't shaken the head and you haven't shaken the brain. You may lacerate his scalp, you may crack his skull, but you don't produce concussion and you don't produce loss of consciousness. But if a man is standing up and you hit him with the same club, not even as hard, if that club is moving at least 28 feet per second and the club is big enough, his head moves suddenly and his brain is shaken; it vibrates around inside of the head, and he loses consciousness and has true concussion. So concussion is a specific thing and it depends upon a quick movement of the head or a sudden stopping of the head against a fixed object.

CHAIRMAN MONTGOMERY: Doctor, have you seen cases in which a man sustained a fracture but no concussion?

DR. ECHOLS: Yes, Mr. Montgomery, I think it is clear that there is absolutely no relationship between skull fractures and concussion. You can have both simultaneously, but there is absolutely no connection.

Very often—and I have seen three such cases myself—a man gets his head caught between a truck that is backing up and a loading platform. He isn't paying attention and suddenly his head is caught between the platform and the truck, and he is trapped there in a vise. His skull changes shape. We have to think of the skull not as a china bowl, but as a flexible thing. You can squeeze the skull and it changes shape, and when it has changed shape sufficiently it cracks. A person in this type of accident is hollering and screaming. The truck-driver gets out and runs around to see what is hapening; then he gets in his truck and moves it forward a few feet. The injured man doesn't fall down, he hasn't any concussion, he hasn't had his brain injured, but he has some large cracks in his skull. He goes around in front and swears at the truck-driver and at the end of the week he is well. He goes back to work unless there is some unusual angle to it, such as bleeding inside the head from the skull fracture.

MR. MAYER: Doctor, in my case the claimant has an abnormal electroencephalogram. I am satisfied that plaintiff's counsel is going to make a definite point of that. Just how can I combat that and of what value is the fact that there was an abnormal electroencephalogram?

DR. ECHOLS: Mr. Mayer, I think that fifteen years ago you wouldn't have had any trouble winning this case, but I suspect that you are going to lose it, and largely because of the electroencephalogram.

Nearly everyone believed fifteen years ago that in concussion with unconsciousness for five or ten minutes, that a few days later or a week later the victim was absolutely recovered and just as good as though he had never been hurt, so it wasn't hard to win cases then. Finally the electroencephalogram came along and it gives proof of real damage to the cells of the brain in concussion, even though there is nothing you can see with the naked eye when the brain is examined.

Now, if you have an electroencephalograph hooked up to a monkey or a dog or a cat, the electroencephalogram is a continuous record of the electrical activity of the brain. You hit the animal on the unfixed head at 28 feet per second with a swinging pendulum and you knock the animal unconscious, and the electroencephalogram's gyrations flatten out to a straight line. There is no electrical activity going on in the brain that can be recorded. Then, after a few minutes, those straight lines start to wiggle, and after a few hours, or a few days, the electroencephalogram is back to normal. So there is proof that physical or chemical changes take place in the brain cells in concussion.

Now I think the plaintiff's doctor is going to present some brain waves—it is easier to say than electroencephalogram—and he is going to show that after this

accident, although the man was not knocked out, the brain wave was abnormal. Now it has been proved hundreds of times that you can hit an animal or a man on the head just hard enough to daze him a little bit, and his brain weave may become abnormal. So we know you can get concussion without completely losing consciousness.

One of the plaintiff's strong points is that he had two or three of these brain wave tests at intervals and the brain wave has returned to normal, or almost to normal. This is pretty good evidence that the brain wave was probably normal before the accident, became abnormal, and is now returning to normal.

I might say that in the last few years the medical profession has realized that the brain wave is being misunderstood by members of our profession and is being abused in court. A few months ago the American Medical Association asked Dr. Paul Bucy, Professor of Surgery of Northwestern Medical School to write a guest editorial for the *A.M.A. Journal* in order to orient the medical profession about the electroencephalogram and about the fact that it is only an inaccurate sort of test and that it shouldn't be used as the major basis for a diagnosis. This editorial which appears in the issue of the *A.M.A. Journal* published April 7, 1956, is well worth reading and useful in court. On the following lantern slides are quotes from this editorial by Dr. Bucy.

(Slide 1)

"It is a matter of common experience that the information gained from electroencephalographic tracings may be grossly misleading and that great care must be exercised in correlating such records with all other clinical and labatory data and in evaluating the electroencephalograms accordingly."

(Slide 2)

"However, this technical method, which is of value both in clinical neurology and in research, now finds its reputation threatened as a result of its misuse and of unwarranted enthusiasm."

(Slide 3)

"However, it is a fact that 5 to 10% of apparently normal healthy people have electroencephalograms that are abnormal."

(Slide 4)

"However, the electroencephalograph is not, independently, a trustworthy diagnostic instrument. No one, by this means alone, can make a satisfactory diagnosis of epilepsy, a brain tumor, or a traumatic injury of the brain."

(Slide 5)

"The electroencephalogram by itself is also inadequate evidence on which to base treatment or to render a medicolegal opinion."

MR. MAYER: Doctor, am I to understand from this that in a certain percentage of normal individuals that there will be an abnormal electroencephalogram? Is that correct?

DR. ECHOLS: Yes. Dr. Bucy's statement of 5 to 10 per cent is on the consevative side so as to have nobody disagree with him, but the electroencephalographers who write on the subject suggest that up to 18 per cent of normal, healthy people who have never had a brain injury or any other brain trouble have abnormal electroencephalograms. I don't think you would get anywhere questioning Dr. Gurdjian about this brain wave. It would simply give him a chance to elaborate on the diagnostic value of the brain waves he has in this case. But why not simply ask him one question and say, "Dr. Gurdjian, what per cent of normal human beings have an abnormal electroencephalogram?" He will give you the same answer as any other neurologist, that is, that somewhere in the neighborhood of 5 to 15 per cent of normal human beings have an abnormal brain wave. I think that will make the kind of impression you want to make; then change the subject. [Laughter]

MR. MAYER: Doctor, isn't it also true that people that have known brain disorders may have a normal electroencephalogram?

DR. ECHOLS: Yes, and that is something for the plaintiff's attorney to lecture on. The brain wave is simply not the accurate instrument it is supposed to be. People with brain tumors, perhaps a third of all patients with brain tumors, have a normal electroencephalogram. The brain-wave test doesn't pick up all tumors. People who have prefrontal lobotomy—the frontal lobes have been disconnected surgically from the rest of their brain

—often have normal brain wave tests. Even some adults with epilepsy have normal electroencephalograms.

MR. MAYER: Both of those points would appear to me to be of value in attempting to minimize the effect of the abnormal encephalogram in this particular case.

DR. ECHOLS: Mr. Mayer, may I go back to your earlier question, which I postponed answering? You asked for a definition of post-concussion syndrome because all concerned with this case have made that diagnosis.

Post-conscussion syndrome is a group of complaints that many human beings have after they have had concussion. There are three major types of complaints: one is headaches, one is dizziness and the third is nervousness of some kind—they can't sleep, they are irritable, they can't seem to concentrate, they don't feel like working, their children irritate them, they can't tolerate noise.

If the patient has had concussion of the brain and then for weeks or months complains of those three things, headaches, nervousness, dizziness, then the neurologist makes a diagnosis of post-concussion syndrome.

This is a very real thing. The headache in post-concussion syndrome isnt just any old headache. It is a mild headache that is relieved by aspirin or when the patient lies down. It is a headache that is made worse when he bends over. It is a headache that is made worse if he does any heavy lifting. It is a headache that is aggravated by an alcoholic drink. In fact, a man who has been drinking fairly heavily every day of his life may be forced to quit drinking.

So, in diagnosing post-concussion syndrome it is important to determine the type of headache. If it isn't the proper type of headache, one is skeptical as to whether the patient has a real headache and a real post-concussion syndrome.

MR. MAYER: Doctor, isn't it true that most of us have suffered symptoms that are somewhat similar to the post-concussion syndrome, those symptoms having been produced by other types of stress and strain?

DR. ECHOLS: I know that lots of people who haven't had head injuries are having troubles that sound like post-concussion syndrome, but it is different. Post-concussion syndrome is a very real thing—a certain type of dizziness, a certain type of headache, a certain type of nervousness. It can not be easily imitated. Once in a while someone contests the diagnosis of post-concussion syndrome because on careful examination none of the patient's symptoms is right—wrong type of headache, wrong type of dizziness, and wrong type of nervousness. Such a patient is considered to be psychoneurotic or malingering.

MR. MAYER: Doctor, there is one thing I would like to mention to you that we might anticipate so that you can be prepared to handle the situation if it arises. Plaintiff's counsel on cross-examination, is likely to confront you with some text material and ask if you know the writer and his status in the field and if you agree with him. Do you have some means of offsetting the effect that that might have on a jury?

DR. ECHOLS: I have one answer to that but it isn't very good and before I give it to you I would like to know what you think about bringing textbooks into court. Would you like to have me quote from some textbooks next week? How do you feel about it?

MR. MAYER: I feel, Doctor, that the introduction of textbooks may have a very definite effect on the jury if it is not offset. However, I understand that in this particular field there are innumerable treatises on this subject, are there not?

DR. ECHOLS: Yes.

MR. MAYER: Why are there so many different treatises on this particular subject?

DR. ECHOLS: There are many points of view on the subject of head injuries, especially on concussion and on post-concussion syndrome, and the reason there are so many divergent opinions is that the medical profession still doesn't completely understand concussion, or the mechanism of the post-concussion syndrome. Since these matters are still in the field of speculation no two writers are going to arrive at the same conclusion, and consequently I point that out in court when I am asked if I agree with the author of a certain text. I say, "Well, I agree with some of the things he says on some subjects, but writers of other

textbooks who differ with him say things that fit more with my opinion."

MR. MAYER: Then by pointing out those different opinions we could minimize the effect of the use of such text material, could we not?

DR. ECHOLS: It might not even be a bad idea to bring to court a list of a dozen recent textbooks on the subject in question and tell the jury that the authors disagree on many points.

MR. BUCHANAN: You will have to be careful, Charlie, that you don't bring one that Gurdjian edited. He has always got his finger in writing books, you know. [Laughter]

CHAIRMAN MONTGOMERY: Mr. Cary, do you not think it would be a good idea to let the two doctors discuss this case and see if they can come to a conclusion and to see whether or not from that conclusion we could arrive at a settlement instead of having to take the doctors to court?

DR. ECHOLS: I think that would be a good idea.

MR. BUCHANAN: Mr. Cary, do you want to let this other fellow pick on you and Dr. Gurdjian.

MR. CARY: Well, we haven't gone quite so far in the settlement of our cases yet, but we are getting pretty close to it. I think we may as well try it here for once.

I think if the two doctors got together, they could probably get pretty close together on an agreed diagnosis.

MR. BUCHANAN: After last night I would suggest we make it during office hours instead of at their home in the evening! [Laughter]

MR. CARY: I think they like to have us take up their day off as a rule.

CHAIRMAN MONTGOMERY: If it is agreeable, then, Dr. Gurdjian and Dr. Echols, would you discuss this case between yourselves and include your definitions of concussion and traumatic psychoneurosis and traumatic neurosis?

DR. ECHOLS: Dr. Gurdjian, may I start by asking you a question?

DR. GURDJIAN: Yes, sir.

DR. ECHOLS: This man had a bump on the head eighteen months ago. He was dazed but not knocked out and you and I are in complete agreement that that is a subclinical form of concussion and that if he had had an electroencephalograph hooked up to his scalp at the time of the accident that it might have demonstrated abnormal waves for hours or days or longer. We agree that this brain injury was without fracture, without lacerations, without hemorrhage, and we both agree, apparently, that he has the true post-concussion syndrome. He has headache and the dizziness and the nervousness of the right types. He couldn't have faked these symptoms. He has had no previous head injury.

Now, everyone agrees that concussion is a reversible condition, that it is a temporary condition, and that the brain returns to normal functioning. Furthermore most of us agree that a person ought to be completely well from the post-concussion syndrome three months after the accident, at the latest. Many writers do point out, though, that as much as 25 per cent of the cases—especially those involved in litigation—are still complaining of headache, dizziness and nervousness six months after the injury, but nearly all agree that practically all patients with post-concussion syndromes get well. Here is a man who hasn't worked for eighteen months and says he isn't going back to work and that he feels as badly as he did right after the injury. He is still dizzy and headachey, has no pep, can't sleep, is unhappy.

Now, where we differ, Dr. Gurdjian, is that you think this man's symptoms—I assume you think this—are real and are produced by physical changes. That is hard for me to believe. I think that he has recovered from his concussion and that he has developed a psychoneurosis which is perpetuating the same symptoms. I agree that he is unhappy and has these complaints but I don't believe that they are now the direct result of the injury. I think he has fully recovered from the injury and that the psychoneurosis, plus a lot of deliberate exaggeration, has taken over.

DR. GURDJIAN: Concussion, we think, is due to the involvement of a specific portion of the brain. It is an involvement of the junction between the brain and the spinal cord, or the head-neck-junction. It is in this area that we have the centers for heart action as well as for respirations or breathing. In the very seriously injured animal under anaesthesia, the

animal dies because there is a stoppage of the respiration and the heart action. The heart action stoppage follows an initial rise in blood pressure.

We have found that concussion can be caused by high energies lasting for short periods of time. For instance, Dr. Echols mentioned the fact that when someone's head gets caught between the bottom of a car and the sidewalk, he may have an extensive fracture of the skull but not become unconscious.

CHAIRMAN MONTGOMERY: Will he necessarily have a concussion?

DR. GURDJIAN: No, he won't. He won't have a concussion for the reason that in this particular instance the effect lasted over a long period of time. It is almost as if he or I were making a surgical opening in the skull, which, of course, does not cause a concussion. We can operate on a patient and take a piece of bone off his head, which is just as bad, or just as good, as a fracture, and yet that patient remains perfectly conscious. The reason for that is that the injury takes place over a longer period of time. We have found that injuries lasting one-sixth of a second or less with adequate energy cause a concussive effect, and the reason for the concussion is that the patient's head suddenly is the site of increased pressure and this increased pressure is contained by the skull and its membranes very nicely all around the head except at the junction between the head and the neck. In that region, as if the bottom were off, there is evidence of pressure extending toward the neck and toward the spinal cord. It is in this area that shear, or tearing, takes place.

Now then, a person could have a portion of the head cut off by a sword, or by a piece of shrapnel, and he might not become unconscious. When the patient is first seen, there may be two, or more ounces of brain tissue on his coat or on the face. Such a patient may not become unconscious. Why? Because in the shearing of the head there was enough energy to also develop adequate pressure within the cranial cavity. These statements are rather technical. They probably are not important from the standpoint of adjudicating cases, but they are informative and interesting to know.

Now the thing that is rather interesting and important is the fact that since we know the degree of injury causing the concussive effect—the amount of energy that it takes causing concussion, subconcussive blows, amazingly enough, also causes some involvement of the brain stem indicating that even subconcussive effects are probably due to certain organic changes in the brain stem. To be sure, they may be reversible. The patient may recover completely. In other words the term "concussion," as we look at it, is not that degree of head injury which is followed by recovery immediately, but rather a type of head injury which could be lethal, which could kill, or it could permit the person to get better. That is what concussion is, as far as we are concerned. It is associated with post-traumatic amnesia or post-traumatic unconsciousness.

Subconcussion, such as in this particular patient, deals with some degree of pressure build-up in the cranival cavity, but not enough to cause unconsciousness. I think that many of these patients who are dazed for a second or two following their injury belong in the subconcussive group.

Now I would like to show one or two slides. These slides are rather technical and I will point to them, if you don't mind, and maybe we could go over them in a hurry.

Slide 1: Injuries to the head may be direct—like a hammer hitting the head [indicating]—or they may be indirect, such as a moving body coming in contact with a nonmoving object. When there is an indirect injury there may be an involvement not only of the head but also of other parts of the body as well, and that is a rather important point.

As a result of such injuries there may be a pushing in of the head or compression; or a sudden setting of the head into motion, or acceleration; or a sudden stoppage of the head, on deceleration, as Dr. Echols told us.

Slide 2: As a result of acceleration and deceleration there is deformation of the skull which, if it is severe enough, will result in a skull fracture. If the deformation is rapid in a given part of the skull, a depressed fracture or a perforated fracture may result. A sudden increase in pressure is another factor. Mass movements of the brain are very important in brain injuries. Mass movements of the brain without a fracture of the skull may occur. Distortion of the skull, in other words, bending of the skull by heavy objects so as to

distort the skull can occur. This eventually may crack the skull.

Slide 3: Here is a patient who has no skull fracture and this patient developed bilateral subdural hematomas without any skull fracture. What was the cause of the bilateral subdural hematomas in this patient? It was the result of the impact causing mass movements.

Slide 4: Here is a patient who has an extensive bruise at the bottom of the frontal lobe [indicating], and that particular bruise can cause personality disorders. This patient did not have a skull fracture. I think that is rather important to keep in mind. Again this was caused by mass movements of the brain. This extensive bruise can cause enough difficulty so that a person like this can become demented in later years.

Slide 5: Here is a skull fracture. [Indicating] Now, this skull fracture—I think you can see it—did not cause an unconscious state, but—(Slide 6) it caused [indicating] this patient to die six hours later because a clot formed as a result of that fracture. He was not unconscious to start with but, of course, he developed a tear and a clot formation, as you see there.

Now, keeping these various things in mind, the importance or the unimportance of a skull fracture in the evaluation of a case, one has to agree that a lot can happen to a head, even though there may be no fracture of the skull, and a lot can happen to a person even though he may not have become unconscious following the blow.

In answer to his question about this particular case, I would say that post-concussion syndrome usually improves—40 per cent of them improve—in about two to three months. They almost always improve faster if they have been injured on their own time. [Laughter]. That, I think everyone will agree with. Physicians and others have noted that.

The point that he made that a post-concussion or post-traumatic cerebral syndrome develops into a nervous state probably is a very good way to put this case, but, after all, the nervous state is also caused by the concussion, or by the concussion plus all the other factors that are involved, so I would say that he and I definitely agree on the evaluation of this particular case. We agree that he may even improve remarkably following the adjudication of his case. He may improve to such an extent that I might even feel funny and might even get red in the face, if I were asked questions about it by Dr. Echols.

MR. CARY: Suppose, Doctor, in this particular case—I think we can bring this up—this man had a loss of taste and smell and hearing, and those things can't be faked—

CHAIRMAN MONTGOMERY: Those were not the facts in the original case. Do you want to assume these conditions for the purpose of discussion?

MR. CARY: Yes, assume that he had a loss of taste and smell and hearing: would you comment on those things, Doctor?

DR. GURDJIAN: Many things can happen to a patient without a fracture and without unconsciousness, and one of the things that can happen are these mass movements that I talked about, which may result in shearing or tearing of the olfactory nerves which are at the base of the frontal lobes here just above the eyes [indicating], and also there may even be an involvement of the hearing as well as some of the other nerves.

I was going to say—I don't want to monopolize the time here—I had a few more slides that I would like to show a little later to demonstrate the extent of violent deformations that the skull undergoes following a blow.

MR. CARY: Are these taste, smell and hearing nerves usually centered in the base of the skull, and is that all the diagnosis? That is, might there be a fracture at the base of the skull that the X-ray wouldn't even picture well?

DR. GURDJIAN: There is a good likelihood that there might be a fracture of the base. X-ray does not show the base so clearly, so that one could have a basal skull fracture with these involvements and still have no unconsciousness and not even be able to diagnose a clear fracture.

As a matter of fact, one of the things that can happen is that a person may go completely blind in one eye without unconsciousness but due to a blow to the head and due to these violent deformations of the skull.

MR. CARY: Would you be willing to go so far in our case as to diagnose a basal skull fracture without positive X-ray findings?

DR. GURDJIAN: Well, of course, the case we were talking about did not have difficulties in the sense of smell or hearing. I don't think that I would diagnose it.

MR. MAYER: I would like to ask Dr. Echols if there would be any possibility in our particular case of this man subsequently developing epilepsy. We often have that thrown up to us following a concussion.

DR. ECHOLS: Epilepsy does not follow concussion of the brain. All writers and investigators agree on that. In concussion the brain is shaken up, the damage is reversible, the brain cells are sick for a little while and recover, and a few weeks or a few months later the brain, for all practical purposes, is normal.

Epilepsy that follows a head injury is due to a scar in the brain. If the brain has been pierced by an ice pick, or a bullet or the brain has been lacerated in a violent injury, the wound heals with scar tissue, the same as a wound anywhere in the body. In the brain that scar tissue is called gliosis. These brain scars may set off epileptic attacks months or years—even ten years—later. All agree that the possibility of traumatic epilepsy doesn't come up for consideration in clear-cut cases of concussion of the brain.

MR. BUCHANAN: Dr. Echols, I am getting a little bit disturbed about this combination of Cary and Gurdjian. You know, I usually take these cases where I am a little afraid of the doctor and I say, "There wasn't any fracture, Doctor?"

And he says, "No".

And I say, "There wasn't any unconsciousness?"

And he says, "No".

And so I wash my hands and turn to the jury and say, "Well, that's that."

And now they come along today and tell us you don't need any fracture, you don't need any unconsciousness, we still have you in good shape. How are we going to get away from that type of deal?

DR. ECHOLS: I don't think you can. [Laughter] I started out by telling Mr. Mayer I was afraid he was going to lose his case. It seems to me that defense counsel are behind the eight ball now in head injuries. The plaintiff's doctor can always point out, as Dr. Gurdjian did, that perhaps the patient had more than pure concussion of the brain. He can always argue that there were some hemorrhages somewhere in the brain with some permanent destruction of some brain cells. It is now known that brain damage can take place without loss of consciousness and without skull fracture, so I don't know of any good defense now except to bring out the favorable points and get the plaintiff's doctor and attorney to admit there was no skull fracture and to admit the patient wasn't unconscious very long, and perhaps get them to admit that the patient wasn't a reliable workman, that he wasn't a very steady family man, that he wasn't a church member and that he was a psychoneurotic person before the injury. It is no use to try to prove that there couldn't have been permanent brain damage.

CHAIRMAN MONTGOMERY: Doctor, it is true, though, that if he has a true concussion he should recover.

DR. ECHOLS: That is correct.

CHAIRMAN MONTGOMERY: And if he gets a traumatic psychoneurosis the chances are that a settlement will help him recover.

DR. ECHOLS: Yes.

CHAIRMAN MONTGOMERY: Now, if he is properly rehabilitated by his employer and he is put back to work, there is still better chance that the psychoneurosis will disappear. Is that so?

DR. ECHOLS: Yes.

CHAIRMAN MONTGOMERY: Well, Doctor, that is a psychoneurosis and not a true traumatic neurosis then?

DR. ECHOLS: Yes. A true traumatic neurosis is a relatively rare thing and it is a permanent thing. Workers with true traumatic neuroses don't get well after their settlements, even if they are good ones, and the psychiatrists can't help them at all.

CHAIRMAN MONTGOMERY: Well, one thing that certainly should be done in preparing such a case is to gather evidence to prove that the injured man does not have a traumatic neurosis, if the subject comes up, but that he has a traumatic psychoneurosis which can probably be cured by making a fair settlement. Is that correct?

DR. ECHOLS: That is correct.

MR. MAYER: How would you determine that, though, Doctor? I mean, what would we have to develop in order to make that point?

DR. ECHOLS: Perhaps we should have had a psychiatrist on the panel. [Laughter].

CHAIRMAN MONTGOMERY: Doctor, you studied neurology and psychiatry before you became a neurosurgeon, isn't that right?

DR. ECHOLS: I am out of practice. [Laughter]. I am afraid I would be getting into deep water if I tried to get into the subject of traumatic psychoneuroses and traumatic neuroses.

MR. MAYER: You would recommend additional professional consultations and examinations in order to prepare ourselves on that particular point. Is that correct?

DR. ECHOLS: If the debate is whether or not the patient has a traumatic neurosis or a traumatic psychoneurosis, several psychiatrists would become involved in the situation to get that important point settled, because traumatic neurosis is a permanent thing.

MR. MAYER: Then, in order to be prepared to combat that, we then should go forward with further examinations and consultations?

DR. ECHOLS: Yes.

MR. CARY: Doctor Gurdjian, even at the risk of helping the defense, will you comment on the arteriogram in some way?

DR. GURDJIAN: Well, an arteriogram is a method of study which is produced as follows: a needle is inserted into the artery of the neck—the carotid artery—on the one or on the other side. Usually this is done on both sides and usually it is done under local anaesthesia but one can use general anaesthesia for it. The needle then is used to inject a radio-opaque substance, in other words, a substance which is opaque to X-rays, and as the injection of 10 cc's or about 2 drams is being completed, a simultaneous X-ray of the head is obtained lasting a period of one-sixth to one-tenth of a second. By that technique the circulating dye which is now in the arteries of the brain is photographed and that gives a picture or an arteriogram, which is valuable from the standpoint of telling whether or not there is a blood clot or a tumor in the brain.

CHAIRMAN MONTGOMERY: Doctor, is that a good way to prove that there wasn't any other damage to the brain?

DR. GURDJIAN: Well, it tells us whether or not there is a mass lesion.

One other point that I think should be discussed: Dr. Echols a minute ago mentioned, on questioning by Mr. Mayer, that a concussion should always improve or get better. Now, the old textbooks talked about concussion, contusion and laceration as indicating different levels of severity of injury, concussion being the least severe, contusion being somewhat worse and laceration being much worse. I say that is not true at all. Concussion has nothing to do with contusion or laceration. Concussion may coexist with contusion or laceration. It can be either reversible or deadly, but a contusion and a laceration is a tear of brain tissue which may not be associated with a concussion.

The diagnosis of a concussion is based upon the history of unconsciousness following the impact, immediate unconsciousness following the impact. I would like to know if Dr. Echols agrees with this, whether or not he thinks that we should look at concussion as a minor type of injury to the nervous system.

MR. BUCHANAN: Dr. Gurdjian, did I understand you to say that concussion follows a period of unconsciousness?

DR. GURDJIAN: Concussion is followed by unconsciousness. In other words, if a person is hit on the head and he becomes unconscious immediately, he has had a concussion. That particular state may be reversible, so he may wake up in a few minutes and shake his head and rub his brow and go back to pitching ball, like Dizzy Dean did one day. You may remember that Dizzy Dean was felled unconscious by a ball one day and he was able to get up and carry on with his activities. He had a concussion.

Now, some concussions are so severe as to cause the death of the individual.

MR. BUCHANAN: I just asked Dr. Echols, and I was going to change doctors because he said, "No fracture, no unconsciousness, you are still in trouble," and I thought he had us in trouble in his case, but now you say you must have unconsciousness to have a concussion?

DR. GURDJIAN: Yes, sir. That is the definition of concussion. Now, a post-concussion syndrome is that state which follows a period of unconsciousness associated with the complaints that Dr. Echols enumerated: headaches, dizziness, personality disorders, and so on. That is a post-concussion state.

CHAIRMAN MONTGOMERY: Do you agree with this, Doctor?

DR. ECHOLS: Yes. Concussion really means being knocked out, but as has been pointed out, you can have a blow to the head which isn't quite hard enough to knock you completely out and yet the electroencephalogram is abnormal and you can have the symptoms of concussion afterwards. What do you call that state, Dr. Gurdjian?

DR. GURDJIAN: I would call that a post-subconcussion syndrome, or post-traumatic cerebral syndrome, the patient having had a subconcussion, and I think evidence is accumulating to the effect that there is some degree of organic disorder even in that group, or that class of patient.

MR. MAYER: Doctor, isn't it true that children who suffer blows to the head frequently have no after-effects and that they are rehabilitated more easily than adults?

DR. GURDJIAN: Yes, I think that, generally speaking, patients under the age of 15 rehabilitate very beautifully, and among them headaches and dizziness are practically never seen.

MR. MAYER: Why is that?

DR. GURDJIAN: I think that probably there are three reasons. One is that the rejuvenative power of the nervous system is better in the younger individual. For instance, a baby at birth who does not breathe immediatly, can go for 3-½ minutes with practically no damage to his brain and he can come out of it being quite normal, almost perfectly normal in some cases. A person at the age of 25 or 30 who has been kept from breathing for 3-½ minutes has extremely severe damage to his brain and in most instances he probably would die either immediately or after a period of vegatative state. So that I think the younger individual can take these blows and recover a little faster than the older individual. That is one.

The second, is the importance of the environment. The environment, one's job, one's responsibilities, all of these things have an influence upon the psyche, upon one's reactions. That is a factor, and in a child under 15 that is not as important a factor.

And the third is that some of us have sick souls. We are much to the left of our misery line. We are always having trouble with our stomachs, we are having headaches, we are having this and we are having that. That type of person who has a head injury, I think, can very easily undergo changes whereby he can fix upon the head injury all of the inferiority complexes, all the inadequacies, that his personality may have. From then on he forgets all of his other troubles and he says, "I have been this way since the injury to my head."

And I think a fourth point which one might consider is that for the person who is intelligent, educated, with an ability to think things out for himself, to rationalize, he will have fewer complaints than the person who has no such ability. Does that answer your question?

MR. MAYER: Yes, sir. I would like to know, though, would the absence of claim-consciousness in a child have anything to do with its rapid rehabilitation?

DR. GURDJIAN: First of all let me say that many a person who has had a severe brain injury does not have a post-concussion syndrome or a post-traumatic cerebral syndrome. People who have had a six-ounce portion of their brain shot off have few or no headaches following such an injury. They may be paralyzed in one-half the body as a result of this, but they won't have post-traumatic symptoms. I have a feeling that post-traumatic symptoms, probably also on an organic basis, are related to an involvement of the brain and spinal cord junction.

MR. BUCHANAN: Do you always have dizziness following a brain injury?

DR. GURDJIAN: Well, we put together 200 cases of post-concussion syndrome and post traumatic syndrome for this little book that I am writing with the help of Dr. Webster. In that group we find that among 100 patients who gave a history of unconsciousness, 91 had headaches and 49 had associated dizziness. There were 6 patients who had dizziness without headaches in the group. There were 2 or 3 who had symptoms such as the lack of a sense of smell and difficulty with eyesight other than headaches and dizziness. The majority of people with post-traumatic cerebral symptoms or post-concussion symptoms have a combination of headaches and dizziness. As Dr. Echols mentioned, the dizziness is very characteristic and it cannot be simulated by the

patient. It is usually brought on by changes in position, bending down, sitting up, getting out of bed, going to bed, for a moment or so they have this dizzy attack. And it is interesting to know that a few patients have no headaches, no dizziness, but they have other complaints such as nervousness, loss of the sense of smell, double vision.

Now, when you compare the patients with post-traumatic cerebral syndrome, those who did not become unconscious following the blow with those with concussions, we find that women predominate in the former. In the post-concussion group men predominate.

CHAIRMAN MONTGOME R Y : I think we have about run the gamut as far as we are concerned up here. Are there any questions that anyone would like to ask from the floor? If there are, will you rise and give your name.

A VOICE: Would you show the balance of the slides?

MR. BUCHANAN: While he is getting those slides, Dr. Echols, I would like to ask you—of course I am not interested in this with the hope of ever having a plaintiff's case—if there is a possibility that one could have severe brain deterioration at a later date with or without unconsciousness at the time of the injury?

These plaintiff's lawyers come to us and say, "But I am worried about the future." How do we get around that? Can we eliminate the possibility of deterioration at a later date?

DR. ECHOLS: In pure concussion there can only be recovery. There can't be any post-traumatic shrinking of the brain, or deterioration, or epilepsy. That is a definition of pure concussion.

CHAIRMAN MONTGOMERY: Well, doctor, how can defense counsel exclude the other brain injuries? What methods are there that could be used to find out about this?

DR. ECHOLS: Getting back to your major problem as a defense attorney, no one can prove that the patient doesn't have physical damage to the brain sustained at the same time as the concussion.

CHIRMAN MONTGOMERY: There is no test that can be run?

DR. ECHOLS: Yes, especially if you are able to point to the fact that the patient had what appeared to be a trivial head injury. If he was knocked out for only ten minutes, you can get most people to agree that there wasn't anything more than pure concussion. If you can point out the absence of a skull fracture, if you can point out that the electroencephalogram quickly went back to normal, or almost to normal, if you can point out that the neurological examination was absolutely negative, and if you can point to an air picture of the brain, a pneumoencephalogram, to prove there is no shrinking of the brain, you will then have presented all arguments that suggest that there was no damage other than pure concussion.

CHAIRMAN MONTGOMERY: And he should recover from a pure concussion?

DR. ECHOLS: Yes:

MR. MAYER: Doctor, I would like to ask one final question about a problem that puzzles all of us. Why is it that two very capable doctors, such as you and Dr. Gurdjian, can take the same patient and wind up with different answers?

DR. GURDJIAN: To whom did you direct that question? [Laughter]

MR. MAYER: Dr. Echols, do you understand what I am talking about? [Laughter]

MR. CARY: I think we ought to have both doctors answer that question. [Laughter]

DR. ECHOLS: Well, I think that if the two doctors actually got together and talked about the individual case, they would influence each other to the extent that they would be almost in complete agreement most of the time. Doctors are in the habit of being sympathetic. They are sympathetic all the hours of their lives. Everybody is coming to them with their problems and they immediately feel sympathetic and wonder if they can help solve the problems, and they get busy on it. The attorney for the insurance company phones up and says. "I am sending you a patient. We think the insurance company is being imposed upon. We don't thank there is much wrong with the man. He did have a little head injury. He has had plenty of time to recover. Now we are being imposed upon. We think the man is well and is exaggerating." So the doctor, who is usually sympathetic to the patient, can't help but feel, even before he meets the patient, "Well, dog-gone it, I have got to spend an hour with

a man who is a malingerer and get involved in this thing." Of course, if he spends sufficient time and is sufficiently open-minded during the interview he may become convinced that the patient really has all the compaints and that they are due to the head injury, and he calls the attorney back and says, "You sized him up wrong, because I agree that he has these troubles." But when a physician only sees a man for half an hour, it is quite possible to end up with a different impression, and that is what we are dealing with, doctors' impressions. There isn't really much else to go on, and, as I pointed out before, there is a lot the medical profession doesn't know about concussion and the persistence of symptoms after head injuries. It is known that after concussion about 20 per cent of people, whether they are insured or not, are still complaining two or three years later, and we don't claim to understand this. So there is plenty of room for two perfectly honest doctors to have a different theory. One guesses that there is a physical basis for these three years of complaints and the other guesses that the patient has recovered, as most do, from the concussion and that he has developed a psychoneurosis.

Sometimes a man gets well during litigation and is forced to live a lie. He thinks he can't tell his lawyer that he is well; he can't tell his wife or his boss or anybody else. He can't go back to work. He is in a difficult position and he becomes psychoneurotic about it. He is worrying. He is well and would like to go back to work and he can't, so he gets sick all over again. The symptoms come back. He has an emotional complex that recreates typical headaches, dizziness and nervousness; he is really sick again.

MR. BUCHANAN: George, I think we have got the wrong doctor on the wrong side. [Laughter] Now, Dr. Gurdjian says that he calls them as he sees them and he doesn't care whether it is going to help your case or not, and here this good doctor on my right says that he has got off on a tangent on a telephone call.

MR. CARY: I can't quite go along there because in this particular case Dr. Gurdjian said that while he wanted to accept the man's statement that he hadn't worked for 18 months, he found some awfully heavy calluses.

DR. GURDJIAN: George, calluses on his feet or on his hands? [Laughter]

MR. CARY: I don't know whether they are on his hands or his feet.

CHAIRMAN MONTGOMERY: Dr. Gurdjian, will you please show us the rest of the slides?

DR. GURDJIAN: Yes.

[Slide] Now, this is the record of an electroencephalogram [indicating] – this is not a lecture on neurological diagnosis, but it is interesting and informative for you to know what these things look like. You can almost tell that this is normal because the rhythm is quite regular [indicating] and you see the needle going up and down regularly throughout. This type of record is supposed to be normal. Many a person has a slightly abnormal record. The chances are that 25 to 30 per cent of us here have slightly abnormal E. E. G. records.

[Slide] This is an example [indicating] of some sharp spikes and the record also shows some slow waves.

MR. CARY: Are these the same man?

DR. GURDJIAN: No. That is a different person. This is a person who has epilepsy.

MR. CARY: I mean, are all of these of the same man?

DR. GURDJIAN: No. No. They are different.

MR. CARY: That is what I mean. We didn't undestand.

DR. GURDJIAN: This wave [indicating] is recorded from leads from different parts of the head, all going at the same time.

MR. CARY: And you take these impressions from eight different parts of the head?

DR. GURDJIAN: At the same time, simultaneously. These [indicating] are– right occipital, this is left occipital, and so on.

MR. CARY: Let me inject this so that the audience may get it. If the injury, let us say, is in the left frontal part of the head, you would expect the abnormality to be associated with the injury to appear in that region?

DR. GURDJIAN: In that region. [Indicating]

MR. CARY: Rather than in some other part.

DR. GURDJIAN: Yes, next one. [Slide] Here is a record [indicating] and when you compare this record with the ones before you will notice that there is a tremendous increase in the electrical emanation. Now, you see this one [indicating the 100 mc measure] is 100 microvolts, and this [indicating the recorded waves] is about 300 microvolts. This [indicating] is the type of record seen in petit mal epilepsy. One usually does not see this type of record in head injury.

MR. CARY: Would this be before an attack, before there had been a definite diagnosis?

DR. GURDJIAN: Yes, sir, and the patient may have any of these attacks without necessarily having clinical evidence of it.

MR. CARY: And you could then say the man appeared to be developing petit mal without having had any actual seizure.

DR. GURDJIAN: Yes, the next one now. [Slide] The next one is a case in which abnormalities occur in only certain special areas. Now, this [indicating] is the type of thing that you see in head injury cases. This record [indicating right side] is very much better than the record from the left side. [indicating the left side.]

And finally, one more. [Slide] This is a type seen in brain tumors. [indicating] Dr. Echols said that only 60 per cent of brain tumors, or masses in the head cavity are diagnosable by this method. Forty per cent are not. Any method used is good for only a certain percentage.

These records here [indicating] on the right side are somewhat better than the records on the opposite side. This patient had a lesion on the left side of the head.

[Slide] Now this [indicating] is an arteriogram. We have injected the dye in the neck and simultaneously we have taken an X-ray. The arteriogram shows [indicating] the blood vessels to the brain in the middle here as well as on the side here. [Indicating] Now, if there were a tumor or a blood clot here [indicating] it would bulge out in that way, just simple mechanics, and the arteriogram is a very valuable tool in our hands.

[Slide] This is the side view of an arteriogram. [indicating] This, too, is a normal record.

MR. CARY: Can you tell the difference between a tumor and a blood clot?

DR. GURDJIAN: Yes, I think so.

Now, this [indicating] is an example of an arteriogram where the middle artery (the anterior cerebral artery) is pushed over to this side. I am not using technical terms, so as to have you follow this easily. The middle artery has been pushed over to the left side here. [indicating] We also find that this particular ramification [indicating] is pushed down this way. This is due to a blood clot [indicating] in this region here.

[Slide] I don't know whether you can see it or not, but there is a mass visualized [indicating] in this patient's head. Can you see that?

VOICES: Yes.

DR. GURDJIAN: That is a tumor mass in which the dye stopped for a few seconds and that is how we got this very beautiful picture of the exact position of the tumor.

MR. CARY: Why a tumor and not a hemorrhage? How do you tell the difference?

DR. GURDJIAN: By virtue of the fact that a tumor does have blood vessels in it [indicating] whereas a blood clot [indicating] has no blood vessels in it, and if this were a blood clot it would have been homogeneous only along the edges where the circulating blood would have to carry the dye. Do you follow that?

VOICES: Yes.

MR. CARY: There would be quite a little difference then.

DR. GURDJIAN: That's right.

[Slide] Here again [indicating] there is a bowing of the anterior cerebral artery due to the presence of hemorrhage inside the brain, or an intracerebral hematoma.

[Slide] And this is a rather unusual blood vessel tumor of the brain. [Indicating]

These are some of the things that you can diagnose by arteriography. In arteriography we can tell a great many things that it is impossible to tell by any other means.

[Slide] Now [indicating], can't you see that the blood vessels here are pushed down by something? Is that right?

VOICES: Yes.

DR. GURDJIAN: By virtue of the presence of this mass here [indicating],

which is, of course, a blood clot, I think you can see that these blood vessels [indicating] are pushed right down. Can you see that?

VOICES: Yes.

DR. GURDJIAN: Next one. [Slide] This is an air-encephalogram. These are the cavities of the brain [indicating]; these are in normal position [indicating], and we think that this reproduction is negative for the presence of atrophy, tumor or blood clot.

[Slide] This is a group of air-encephalograms showing the position of the cavities of the brain. They are [indicating], you see, symmetrical and they are equal on the two sides, and such pictures are essentially negative or normal.

[Slide] Now, here is an air-encephalogram where the cavities are pushed over to one side [indicating] and you will notice that there is air [indicating] on the external surface of the brain, but none on the opposite side [indicating]. This is quite typical of a subdural hematoma or a blood clot on the outside of the brain.

[Slide] Now, I wanted to point out two more things. This [indicating] is an airplane which impacted the earth at 380 miles per hour. The pilot lived for four weeks. The reason why he lived for four weeks was because he was properly packaged. If you and I are properly packaged we can survive injuries as bad as 300 miles an hour of impact velocity, and the packaging and the proper building of these vehicles will undoubtedly come as the years go by, and that is after all the thing that will control the effects of such injuries.

[Slide] And here [indicating] is the path of a fellow who fell out of a fifth story window. [indicating] He hit his arm against the ledge here [indicating] on the fourth floor, and he dropped on the top of a car in the street. [indicating] He broke his arm at that point [indicating the fourth floor ledge], but he was perfectly conscious here [indicating the top of car] at impact. From that we learn that if an impact is administered over a longer period of time, there will be no serious head injury. It is adequate energy of very short duration which upsets the apple cart.

MR. CARY: What about this theory of riding backwards in a plane?

DR. GURDJIAN: That is a good idea.

CHAIRMAN MONTGOMERY: I think that there was another question. Mr. Velpmen!

MR. HOWARD C. VELPMEN: Would you explain the relationship of the spinal tap in the diagnostic features of a contusion of the brain?

DR. GURDJIAN: Dr. Echols, do you want to answer that?

DR. ECHOLS: The question was, "Why are spinal punctures done and how are they useful in cases of contusion of the brain?" If a brain is contused or bruised, perhaps in one or several places, there is apt to be some free blood that mixes with the spinal fluid, and a spinal puncture would show blood in the spinal fluid, although not always. In the case of deep-seated contusions inside of the brain, there would be no way for the blood to mix with the spinal fluid, so one can have contusions with normal spinal fluid and one can have contusions with bloody spinal fluid. Normal spinal fluid doesn't rule out contusion of the brain, unfortunately.

One other thing is learned; in severe contusions the bruised and lacerated and hemorrhagic parts of the brain begin to swell and the pressure in the head goes up and consequently one may find high pressure when a gauge is attached to the spinal puncture needle. However, even in fatal head injuries the spinal fluid pressure is sometimes normal or subnormal, so it isn't too helpful a test unless the spinal fluid is bloody or the pressure is high.

MR. A. MILLARD TAYLOR: Many times we have had situations in which patients refuse to submit either to an air-encephalogram or an arteriogram. Will you tell us what after-effects, if any, a patient has after undergoing either or both tests?

DR. GURDJIAN: Air-encephalogram is extremely painful. In our clinic, it is done under general anaesthesia, but following awakening there are headaches which may last for two to four days, in some cases longer. It is a very painful test.

We have had a few patients who have had three or four such tests over a period of several years, but most people dread the idea of having another air test.

Now, an angiogram is not bad. Angiogram can be done under local anaesthesia, or under pentothal anaes-

thesia, and usually there is no serious after-effect except for some pain in the neck because of the use of the needle through the neck structures to get into the artery.

Generally speaking, when that question comes up we frankly tell the patient that these procedures are painful, and that he should talk to his lawyer, if he doesn't want to have it done. [Laughter]

MR. TAYLOR: Are they dangerous? Danger of infection?

DR. GURDJIAN: No. Ordinarily not. There is a possibility, I suppose, of infection entering the cranial cavity from introducing a needle into the spine, but, with the present-day availability of antibiotics, I think that even if there were an infection, which is a very uncommon thing, by the way, it can be properly taken care of. The only time that air-studies may be dangerous, particularly from the standpoint of infection is when there may be repeated air-studies in the course of 5-15 days.

Of course, the usual post-traumatic head injury fellow never does anything unless he first talks with his lawyer, as I said before.

Other people, sick with brain tumor, and other serious illnesses are happy to have you do anything to help. In other words, among them the post-puncture symptoms are minimal compared with the people with post-traumatic complaints.

I think—Dr. Echols had probably better answer this, too—I think there are no permanent damages from either one of these tests, but there is always an outside chance that something may go wrong at the time that you are doing these tests. There have been instances, following an angiogram, of a paralysis of the opposite half of the body, but that usually will occur in patients who are in a stroke category, patients who have stroke-like conditions, rather than patients with head injury.

We had one instance of death in our group of a little over 500 angiograms with only about 10 minor complications. Anything you do in the form of tests can have some danger attached to it, but if these are minimal, then the tests are perfectly proper to use. An air-encephalogram is a good test because it tells us whether or not there is a blood clot and it tells us whether or not there is atrophy of the brain and it tells us whether or not there is scarring of the brain. All these things are valuable information which help adjudicate the case more effectively. Does that answer your question?

MR. TAYLOR: Yes.

CHAIRMAN MONTGOMERY: [Addressing Dr. Echols] Are you of that opinion, too?

DR. ECHOLS: I don't disagree with anything that has just been said. I would like to point out, though, that several times in a year I see some pathetic character who had a serious brain injury a year or so before. He is fuzzy-headed. He isn't the same man. And yet, neurological examination is negative, X-rays are negative, and the electroencephalogram is negative. However, one just knows from the history, talking with the relatives and talking to the man, that he has permanent brain damage, and in such cases I recommend that he have a pneumoencephalogram made in spite of the two or three day headache that goes with it, because he is almost sure to come up with objective proof of a shrunken brain.

[Slide] Here [indicating] is a brain of a patient hurt many years before, and you can see that the brain is shrunken in places and smaller. This would have shown up very plainly in a penumoencephalogram. But most people with mild head injuries won't accept the pneumoencephalogram because they know in their hearts there isn't much wrong with their brain and that it isn't going to show anything.

CHAIRMAN MONTGOMERY: Mr. Nelson!

MR. ROBERT M. NELSON: There are certain other parts of the body, liver, kidneys, and so forth, that have wonderful regenerative and rehabilitative power. To what extent does a brain cell? We have been dealing with testimony to the effect that damage to the brain is permanent and it does not regenerate and rehabilitate. To what extent do you think the brain cells regenerate?

DR. ECHOLS: In pure concussion of the brain, the brain cells are damaged but not destroyed. The cells are temporarily sick, and they recover. In lacerations, severe bruising and crushing of the brain, there is destruction of cells followed by formation of scar tissue and no attempt

whatsoever is made for new cells to grow in place of the destroyed ones. It is quite a different story from injury to skin and bone.

MR. GEORGE CAMP: You were talking about the symptoms of the post-concussion syndrome, including headaches, dizziness and nervousness. My question is, how soon should these ordinarily appear in the average individual if he had had true concussion? In many instances I have found a man who was injured and went to a doctor but made no compaint. Then after he went to see his lawyer and his lawyer sent him to *his* doctor, he turned up with three complaints.

CHAIRMAN MONTGOMERY: Dr. Gurdjian!

DR. GURDJIAN: I would say that the headaches and the dizziness should come within the ensuing three or four days after the injury. They many occur immediately—by that I mean by the following day—but usually within the first four or five days. The headaches may be of two varieties, localized headaches, particularly in the vicinity of the bruise, such as a cut or a bruise of the scalp, or a generalized headache, and headaches in the back of the neck, particularly considering the people who may be injured in the cranial-spinal junction area such as from whiplash injuries.

Dizziness may not accompany the headaches. Usually it does. It is a momentary difficulty and usually it disappears as the patient straightens up or bends down or completes the act through which the dizziness is brought on.

The headaches usually disappear by becoming less frequent, but occasionally we see a patient who may have periodic type of headaches, one that occurs once every two weeks, once every three weeks following a head injury. We think that most of those probably pre-existed the head injury and that they are usually due to migraine.

Generally speaking one should also include among these post-traumatic cases the few patients who, on careful study, will show that they have a delayed blood clot. Such cases should not be missed for the reason that they are curable and in the absence of a correct diagnosis they will die. They will die either at home or in some veterans' facility or in some hospital. It is a terrible thing to miss a so-called subdural hematoma following a relatively minor head injury. They, too, have headaches. Some headaches may be neurotic in origin. Discussions may pinpoint the complaint to the extent that after a while the patient may sell himself on the idea that he really has the headache, but, as Dr. Echols said a little while ago, the usual case of post-traumatic cerebral syndrome has such a combination of complaints that they are usually genuine.

I should emphasize one other point: If a person has a headache which never disappears he probably does not have a headache. [Laughter] If a person has a headache that comes and goes, he probably is suffering.

MR. BILL CAMBELL: Nobody has mentioned vomiting immediately after an accident? What effect woul that have on your diagnosis?

CHAIRMAN MONTGOMERY: Will you answer that, Dr. Echols?

DR. ECHOLS: Vomiting sometimes does go with concussion and other head injuries and sometimes it doesn't. I don't know what else to say about it.

MR. LOUIS M. DYLL: Recently I was confronted with a new test, said to be a vestibular test. That is the introduction of a certain amount of water at a certain temperature into the ear canal. This produced nystagmus of the eyes and variants from one ear to the other. This was claimed to be a new test for brain damage where the classical tests did not disclose such damage. What, if anything, do you know about that?

CHAIRMAN MONTGOMERY: Dr. Gurdjian!

DR. GURDJIAN: That is not a new test, the vestibular test. Vestibular tests have been carried out for many, many years. I should say that when there is a head injury, there may be an injury to the intercranial contents, as well as to the bony structures that encase the ear mechanism. Particularly in boxers, these may be an involvement of the petrous bone which houses the vestibular and hearing mechanisms. Actual experimental work shows that there may be a damage to the lining cells of the vestibule as well as the hearing mechanism.

Now, if there is a complete destruction of the labyrinth, the injection of hot and cold water in the ear causes no change

whatever in the eye movements—in other words, there is no nystagmus. If there is a hyperactive vestibular test, then a small amount of fluid will cause a nystagmus, but an actual damage to the vestibular nerve results in a loss of vestibular mechanism.

The amazing thing is this, that many of the cases that we have studied with the vestibular test, who have a lost vestibular mechanism, are not dizzy at all, I think that the answer to it is that the difficulty lies not in the ears themselves but rather in the brain stem or in the area that we have talked about which contains the consciousness center. It also contains the pathways for the erect posture of the individual.

Vestibular tests are valuable, but they don't necessarily imply any special type of brain injury. I would say if there is a peripheral or an ear involvement, it is almost impossible to get the vestibular nerve without at the same time destroying the hearing nerve, so that one should see both a deaf person plus one with a dead labyrinth. If there is only dizziness, then it is due to abnormalities in the brain stem.

MR. FRANK CARTER: I was just wondering, Doctor, wouldn't it be possible for a well-informed malingerer to simulate these three symptoms, these three types of symptoms that you have mentioned?

CHAIRMAN MONTGOMERY: Will you answer that question, Dr. Echols? And this is the last question.

DR. ECHOLS: He would really have to be well informed to fool a good neurologist who spent the right amount of time on the case. As mentioned before, it is not just any old headache, it has many characteristics. It goes away when you lie down. It isn't always there. If you bend over you have it. If you take an alcoholic drink it comes on. So he really would have to be very well informed and coached by a person who had experienced it all. I doubt if that would happen.

A VOICE: It could happen?

DR. ECHOLS: It could.

CHAIRMAN MONTGOMERY: Well, ladies and gentlemen, that ends this session. I hope I will see you here tomorrow morning at nine o'clock. [Applaues]

How Much Is A Claim Worth?*

FORREST STUART SMITH,**
Richmond, Virginia

NO ONE has yet suggested a workable formula for evaluating pain and suffering or the mental anguish of those who have lost the love and affection of dear ones. However, with the full knowledge of the facts, which should include, first, an opinion from trial counsel on the liability under the laws of his state, second, a report from him concerning the integrity and ability of the plaintiff's attorney and attending physician, third, a report on local conditions and juries, and fourth, a report from our examining physician on the injuries sustained and his opinion as to any resulting disability from the injury and the permanency of its nature, we should be able to take the evaluation of a claim out of the realms of guesswork.

Let us for a moment consider why it is necessary to evaluate a claim and establish a reserve.

First, the home office is required to place an accurate value on a claim as soon as possible. The rates that insurance companies charge for personal injury and property damage coverage on an automobile are based on their experience. This means the ratio of the losses and expenses paid as compared to the premiums. If a claim is promptly settled, the company, of course, knows what it costs, and it goes on the record. However, on those claims that cannot be promptly settled, due to unreasonable demands or other factors, and litigation results, the disposition of the claim may be drawn out for several years. It is, therefore, necessary for the

*From an address delivered at the University of Kentucky Law School.

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company to establish a reserve as soon as possible which is an estimate of the value of the claim, or what the claim is likely to cost. This reserve can then be figured in the assured's experience and an adequate rate established.

Secondly, insurance companies are also required by the Insurance Departments of the states to carry an adequate reserve for each outstanding claim as a liability on their books.

Thirdly, it is important for the company to arrive at a reasonably accurate evaluation of the claim so that it may notify its reinsurer, when it is believed the value exceeds its retention, or notify its assured when the evaluation exceeds the limits carried.

Having established the necessity for an evaluation and a reserve let us now discuss what the company requires of trial counsel.

Trial Counsel's Part

In the beginning, the trial attorney should carefully analyze the claim file and then review the points of law involved. A consideration should be given to the possibility of establishing controverted questions of facts favorable to the defense and, if there appears to be no question about the facts, then an opinion on liability should be submitted. If the investigation as reflected by the file furnished him appears incomplete, trial counsel should point out the weaknesses and outline the further investigation indicated, and he should, if necessary, supervise the additional investigation.

Some companies, perhaps, do not like trial counsel to tell them the settlement value of a case. My ideas have always been otherwise. It seems to me that this is one of the most important things that the home office should expect from trial counsel. We will have our own ideas, but the attorney in the field, due to his local experience, is peculiarly fitted to appraise value. He may not want to give his opinion on that question until after conferences with opposing counsel, and perhaps not until he has had a chance to review the jury panel at the term of court at which the case is to be tried and, if possible, learn what the panel has done on prior cases. That opinion, as any experienced trial lawyer knows, is subject to revision upward or downward as the case progresses, either before trial or even after trial has commenced. Nevertheless, I strongly believe in the value of a preliminary opinion from local counsel, and this should be given at the time or before the pleadings are drawn. It should reflect a thoughtful analysis of the case and should include such recommendations as can be made at that preliminary stage. This is the time to express disagreement with an opinion already in the insurance company's file and also to place a suggested settlement value, if counsel believes the case should be settled rather than tried. I have never been able to understand why otherwise very able counsel are so often reluctant to recommend a settlement figure, but they frequently are. Further investigation, if any, should be noted, but counsel should be careful about this and avoid the "shot gun approach". If he wishes to keep on good terms with the local adjuster, he should ask for no more additional investigation than he needs.

When the file is complete, then trial counsel should make another report giving to home office his fair and full recommendation and discussion on the following topics:

(1) A full and complete analysis of the evidence developed thus far.

(2) A comment on the testimony of the witnesses involved and what he can expect to prove by their testimony.

(3) The ability and/or resourcefulness of opposing counsel. This ability should not be limited to courtroom tactics, but should also include a evaluation of his ability to protect his record and whether or not it is his practice to "build up" his case.

(4) Some information of the forum in which the case will be tried such as:

(a) the type of jurors usually available,

(b) the size of verdicts in comparable cases,

(c) the ability of the trial judge, his known leanings and his appellate record.

(5) An upper limit on dollar value of the case from a verdict standpoint, and the chances of a successful defense percentagewise if possible, and finally,

(6) his recommendation of a figure

the company should pay in settlement in preference to trial of the case.

Local counsel should not in his opinion exaggerate the dangers of a case or the value of a case. This is especially important in certain cases where the *ad damnum* exceeds the limits of the policy. Most counsel are not guilty of this, but there are some who will build up the case so that they will have greater credit for a win and more protection for a loss when a jury brings in the wrong decision or a high verdict. A really worthwhile preliminary opinion will do local counsel more good in his relations with the home office than almost anything else. It is also beneficial to him, because it focuses and toughens his thinking on the case. However, counsel will be judged by the opinion not only at the time he gives it but also just before trial and after trial, so he must make certain that it is his considered and frank opinion.

I would like to emphasize that home office counsel is not likely to know the peculiar local conditions which are likely to influence the decision whether to stand trial or not, and the evaluation of a case for settlement. Therefore, a recommendation should be supported by the recital of all factors taken into account by local counsel in arriving at his opinion.

As the case develops, local counsel should keep the home office and/or the branch office acquainted with developments. He should report fully on settlement negotiations, send in brief reports on depositions taken, brief reports covering any pre-trial conferences, or other events of significance. As the case approaches trial, he should be sure to report this fact, allowing ample time for review and conference when necessary. Counsel at home office are likely to look with disfavor on trial counsel who telephones on Friday afternoon to report the case is number one on Monday's calendar.

When trial counsel has furnished this information to the home office via the proper channels he, in my opinion, has done his duty and should accept home office rejection of his recommendations, if there be any, cheerfully and without resentment and be guided thereby. Trial counsel should not take a rejection of his views and evaluation by home office as an insult to his intelligence and in his own mind brand home office as incompetent. It should be borne in mind that home office may have various reasons for differing with him or for not following his recommendations. They are entitled to their opinion and also it is very probable that they have problems not known to counsel and which should not be his concern. Remember also that home office has responsibilities which are not counsel's and which he should not be burdened with. Such problems may be coverage limits, coverage peculiarities of a particular assured, or other reasons that may be the basis for their decision not to do as he recommends.

If a lawyer thoroughly analyzes his case in his opinion, and informs the company of the potential dangers, and makes recommendations based upon sound principles, there can be no just grounds for criticism by the company if it elects not to follow such recommendation and risk a trial which goes against it.

It should be borne in mind that home office not only invites trial counsel's views and recommendations, as well as his honest unbiased opinion concerning the value of the claim, but in fact has the right to insist on it, and the fact that such recommendation as to value might not be followed is no reflection on trial counsel's judgement and does not in the least lessen the value of the recommendation to the home office.

I should like to inject here a remark which does not come, strictly speaking, within the subject of this paper. Nevertheless, it is in my opinion, important. It is that every good defense trial attorney should be a good adjuster. In these days of uncertain results, high sympathetic verdicts, and the ever increasing cost of litigation, I believe the companies are interested in settling a great majority of their cases if fair and reasonable settlements can be had. Therefore, trial counsel should explore settlement possibilities as soon as practical and should be ever alert to bring about a settlement advantageous to the company. As you know almost every litigated liability case involves questions of fact and has questions which can be successfully and legitimately used as a basis for compromise. Once a suit has been started and the litigation entrusted to you, the home office should be able to depend upon your experience, your knowledge of local conditions, and your acquaintance with your adversary to determine how and

when serious negotiations for settlement should be undertaken. Conditions may permit you to settle a case satisfactorily to both parties even before you have filed an answer. On the other hand, the opening may not come until the final argument has been made and the jury retired.

We come now to the pre-trial opinion and recommendation of trial counsel. He has already evaluated the case from a settlement standpoint, but there may have been developments in the file which will have caused him to revise this figure. The mere fact that this case is on the trial calendar and will shortly be reached for trial is not in itself any ground or reason for upping the previous evaluation of the claim. However, I will say in passing that some trial counsel are prone to raise their figure for no other reason than that the case will shortly be reached for trial.

In his pre-trial opinion the lawyer should advise the company of his views of the defense, rating each witness as to appearance, effectiveness, etc.; point out the ability of opposing counsel (or lack of it), the reputation of the plaintiff in the community, the current trend of jury verdicts, the time it will take for the case to reach trial, the leanings or prejudices, if any, of the local judge and the extent to which any of these things might influence the results of the case. Such factors are every bit as important in appraising settlement value as the law or the actual facts of a case, and sometimes even more so. He should report on his views concerning the injury and medical aspects of a case after conferring with the examining physician. It would also be helpful if he would give his views concerning the effectiveness of the examining physician as a witness. A report on the jury panel and what they have done on previous cases tried, if any, would be helpful.

A lawyer who gives a colored report of the facts or conditions is more harmful to the defense than one giving no report at all. Colored reports of facts, law and biased medical opinions cannot be tolerated.

This pre-trial report should be submitted to the company in ample time for it to give full consideration to the report and trial counsel's final recommendations. If the case goes to trial, we like to be advised by telephone or wire of any unusual developments in the case, something that was not anticipated or something that has developed less than was anticipated or worse than was anticipated. In other words, any development that would tend to change the complexion of the case should be reported. If there has been any material change in the settlement demand and a figure has been submitted which trial counsel feels that the home office should consider, it should be promptly advised. It is also very helpful to home office counsel to have trial counsel's views and his report at the end of plaintiff's case, to give them a chance to re-evaluate the case, if such is warranted.

Some plaintiffs' lawyers contend that the value of a case can be reduced to a mathematical formula, so much a day for the injury, suffering, disability, etc., but such is not the case in my opinion. Such items can only be taken into consideration. Nevertheless, as a practical matter, large verdicts are often based upon the acceptance by the jury of some such formula.

It has been stated, and I concur, that one of the most prevalent exaggerations on the part of plaintiff's counsel occurs when he presents a simple formula on chart or blackboard by which he calculates damages for loss of future earnings by the simple expedient of multiplying the remaining days of average life expectancy by the decrease in daily earning power.

The hundreds of circumstances which might have prevented the plaintiff from earning a fixed income must be pointed out to the jury in argument to clearly show the fallacies in that method. For instance, mortality tables are based upon an average expectancy of life—not the expectancy of gainful employment. The method assumes that the individual in question will spend the entire time before he dies working at this same rate of pay. It assumes that he will have no last illness and that he will work not only the day before his death but every day, week month, and year from now until death, without interruption.

The method assumes that there will be no decline in the earning capacity of the individual as he advances in years. The method assumes that the plaintiff will never be unemployed and that he would never go out on a strike or be idle because of strikes in other industries. It assumes that the present rate of economic activity, brought on by war, subsidation, and defi-

cit spending will continue for the rest of the man's expectancy, though reasonable people will concede that periods of prosperity and full employment do not go on forever. Under that method no deductions are considered for state and federal taxes, which we all know take big chunks out of our income.

In making his own computation, defendant's counsel must at times resort to such a method. However, we think he should generally refuse to recognize the validity of this method in evaluating a claim.

For plaintiff's counsel to pick an arbitrary figure and say that he will assess $1.00 for each twinge of pain or $10.00 for each day of pain is nothing short of ridiculous. The tolerance of different people for pain is extremely varying. People learn to endure pain and live with it. It is not simply a question of how much a member of the jury would take to sustain a similar injury and undergo similar suffering. It is just as much a question of how much one of the jury would feel that he in good conscience should have to pay out of his own pocket for a mere inadvertent act on his part which might result in a similar injury to some member of the public.

The Physician's Part

Up to now, I have said very little about what the examining physician can do to help trial counsel and home office counsel to properly evaluate a claim; however, this does not mean that the doctor's help is secondary. It is in fact of primary importance. Medicine is involved very intimately with insurance, from the very inception of the insurance contract all the way up to the paying off of a claim for injury and disability or death.

In all forms of insurance, be it automobile public liability, workmen's compensation, life or endowment, health and accident, hospital and surgical expense or the like, the doctor's examination, report and evaluation of disability are all important.

The examining physician should have a history of the case including a brief recitation of the facts of the accident, the injured party's condition and actions immediatly after the accident, etc. To me, it is very important for the doctor in his examination to know what to look for, to know what portion of the history of the case given to him by the claimant to discount, if any.

The examining physician should, before conducting his examination, review the attending doctor's report, if one is available, and he should also endeavor to ac certain the attitude of the attending physician, his diagnosis and treatment and how he arrived at such a diagnosis, to obtain information as to how long his patient will be incapacitated. He should closely examine the hospital records, if it is permitted. He should also examine any X-rays taken by the attending physician before his examination, and, by all means, he should get a case history from the claimant.

All too often, we get reports from examining physicians who base their examinations on nothing but what the injured party tells them. If the complaints are subjective, the report is practically worthless, whereas, if the examining physician knew something of the facts of the accident and the case history, he would be in a much better position to render his opinion concerning the validity of the claimant's subjective complaints.

The importance of this observation and warning does not apply to the claim of an honest plaintiff, but relates particularly to the claim of a malingerer who gives to the examining physician innumerable subjective complaints, the existance of which necessarily depend upon the honesty of the patient. An examining physician must include in his report these subjective symptoms. If they are cleverly conceived by the plaintiff, the most that the examiner can say is that while no objective findings support them it is impossible to deny their existance and that theoretically the cause of the complaints might be from trauma.

Some examining physicians insist on taking X-rays of their own before they will agree to make an examination. I should like to comment briefly on this point. We do not approve of this practice, for we do not believe in taking X-rays for exploratory purposes. In other words, we are seeking by the examination to affirm, deny or discount the allegations of injuries and resulting disabilities of the claimant. If the examning doctor is satisfied from the history of the case, the hospital records and the X-rays of the attending physicians that an alleged fracture exists, then why should we take additional X-rays? If

on the other hand, the attending physician has diagnosed a fracture or a condition which we or our examining physician questions, then, of course, he should take his own X-rays, but only after seeing the X-rays taken by the attending physician. It cannot be overlooked that in most jurisdictions opposing counsel is entitled to copies of all medical reports and information furnished to the defendant.

The examining doctor should make a report to trial counsel that trial counsel and home office counsel can understand and make a recommendation to the trial attorney or the company's adjuster as to the best manner in which his case should be prepared from a medical standpoint.

A medical man's opinion should be the same irrespective of whether the asking price is $1,000.00 or $10,000.00. He should not commit himself by making statements to fit the convenience of one case because it can be settled for $1,000.00. An examining physician, to be helpful in assisting trial counsel and home office counsel in evaluating the case, must be consistant. He must not be influenced unduly by matters other than the medical features.

In former years, much more than today, counsel dealt rather openly in the handling of their cases. The facts were reviewed objectively. Medical reports were freely exchanged. "Doctors were not advocates, but reported what they found rather than what others wished they might find." The same workmen are at their jobs today, but all else has changed. We have now what we call the "practitioner of legal surgery", and that is best defined as a doctor who does much of his practicing on the witness stand.

I might say in this connection, however, that there are many, many instances where we are satisfied with the ability and integrity of the attending doctor or surgeon, and in such cases do not feel it is at all necessary to have an examination by a doctor of our own selection.

I now have a better "medical picture" of what an attorney meant one day when he said that he had to go to work on the "build-up" of the injuries in a case. I have heard lawyers say that they look for this sort of business to reach such proportions, if it has not already done so, as to require action by both bar and medical associations. I include medical associations because I believe that when a false medical claim is made, the real guilty party is the doctor. No matter how anxious an attorney may be to present a false medical claim, he cannot do so unless the doctor or doctors in the case furnish him the material.

It used to be that evaluation was not affected by the plaintiff's lawyer and doctor. This is no longer so, for there are attorneys who immediately upon having a case referred to them, start to "build-up" the injury. The first step is to change doctors and have the claimant put under a doctor of their selection. In other words, the lawyer calls in a doctor who will testify to injuries the attending physician did not find. Thus, a simple back injury is "built-up" into a ruptured intervertebral disc, or a simple blow on the head is "built-up" into a post-concussion syndrome.

The examining doctor can be of invaluable assistance to trial counsel and home office counsel in spotting these "build-ups" and suggesting means of tearing them down at the time of the trial.

Turning to the topic of disability evaluation, we come first to the question of what is meant by disability. I will certainly not attempt to define disability, I would like to point out that what is disabling to a laborer or a mechanic or a farmer might not be disabling to a professional man, a schoolteacher or an office worker. I, therefore, think that when an examining doctor comes to making his evaluation of the disability, a man or woman's occupation should be taken into consideration. There is no one yardstick for measuring all disability. Each claim must be decided on its own merits.

The law recognizes the licensed physician as the only person qualified to determine the extent of personal injury. It is on the doctor's estimate of physical handicap that we must depend. While some standardization of medical evaluation of disability is most desirable, none to my knowledge has been devised as yet. But the factors covered should be earning capacity, adverse influence in securing employment, vocational loss and cosmetic loss Disability evaluation is a game that keeps lawyers, doctors and insurance companies on their toes. Again I say that there is no yardstick by which to measure disability evaluation. Each case is a problem unto itself, to be weighed and judged according to its own facts and circumstances.

OUR READERS SPEAK

Readers of the Journal are invited to use this department as a place to express their thoughts on subjects of insurance law, trial practice, and the like. The opinions expressed are, of course, those of the writers and are not necessarily the views of the Journal or the Association.

Editor of the Journal

Dear Sir:

I am extremely sorry that I was unable to attend the recent meeting at the Greenbrier Hotel; however, illness precluded me therefrom.

I have read, with interest, the Convention Issue of Insurance Counsel Journal, and particularly the Open Forum concerning the evaluation of a personal injury case for settlement purposes. I may observe, by way of parentheses, that I have thoroughly enjoyed the convention issue as a general proposition, although I read with alarm the Opening Remarks of the Honorable J. Skelly Wright, and feel so strongly incident thereto, that I cannot refrain from making some observation concerning such remarks.

Judge Wright states, and I quote, "The answer to the problem of delay in the administration of justice is not an increase in judges, courthouses and all that goes with it. It must be remembered that the judicial process is a parasite on the economic process. The judicial process produces nothing but resolution, after some delay, of disputes arising out of the economic process, and there is a limit to the added burdens our economy can stand. Consequently, it behooves us all, judges and lawyers alike, to seek out a method of improving the judicial process by increasing its capacity as well as its efficiency. Unless we are successful in improving the admnistration of justice, prospective litigants will continue in increasing numbers, as they have in the past, to seek arbitration of their disputes rather than risk the delays seemingly inherent in the administration of justice."

It has never occurred to me that the Judiciary constitute a parasite upon our people any more than the Executive or Legislative arms of our government. All three of the arms are needful and necessary to our democratic processes. I disagree vigorously with Judge Wright, in that I feel our courtroom facilities should be enlarged, and the number of judges increased substantially, and likewise I feel that judges' salaries should be increased, in order that competent, capable, successful, trial lawyers, who do not possess independent means, may be attracted to the Bench.

I would not say that extravagance and waste do not obtain in the administration of our government; however, I believe the record will disclose that economic and monetary waste as such obtains largely in the Executive arm as well as in the Legislative arm. To illustrate, I recall three or four years ago, while attending a meeting of the Virginia Bar Association at White Sulphur, that a member of the federal Judiciary from the Circuit Court of Appeals, in addressing one of our day meetings, stated that the appropriation extended to the Weather Bureau was in excess of the appropriation extended to the entire federal Judiciary, which included all expenses from the janitor to the Chief Justice. Such a situation is rather difficult to comprehend, and I cannot believe that it is the desire of the people of these United States to have more interest in the weather than they do in preserving their democratic way of life through the courts.

I also observe that Judge Wright made an observation concerning pre-trial con-

ference, and I quote, "At the pre-trial conference, the judge often gets his first information about the case. At the pre-trial conference, after refining the issues, he requires both sides fully to disgorge all of their evidence, thereby eliminating the possibility of surprise. Both sides then know, also possibly for the first time, the strength of their opponents' case and the weakness of their own. In this way, trial by suspense, by bush fighting and shadow boxing is eliminated. The lawyers then know exactly what the evidence will amount to, and if the lawyers are worth their salt, they can place a proper evaluation on the case. A case properly evaluated by both sides at the pre-trial conference, sometimes with the help of the court, results in settlement of that case before trial."

It is interestingly significant that the procedure as described by Judge Wright does not obtain in the Federal Courts in this area, insofar as has been my practice. I cannot conceive of counsel for either party "disgorging" all of their evidence, and to be perfectly frank, I have no intention of engaging in such a practice, even though the court would make such a request. I can only say that if the court would hold me in contempt, then contempt it would be, and I would sit in jail until such time as I was released; nor would I permit, while I was handling a case for either the plaintiff or the defendant, a Judge to set an arbitrary settlement figure in a case and require me to pay that sum, if I were representing the defendant, or on the other hand, to accept that sum if I were representing the plaintiff, as demonstrated by Judge Wright in the Open Forum. In my judgment, a court can suggest that perhaps a compromise should obtain, and tactfully work in such a direction, but to arbitrarily set a figure and in effect demand that such a figure be accepted, is to me incomprehensible. The attorneys representing the respective parties are in a better position to evaluate the case than anyone else, and if they cannot reach an agreement, then I cannot conceive of a third person coming into the case, with little or no information except that which is given to him at the pre-trial conference, arbitrarily evaluating a case and demanding a settlement figure incident thereto, the same as if he were trying a case without a jury.

I am constrained to subscribe to the pronouncements set forth by our President, Lester P. Dodd, in his address entitled "The Vanishing Tribe", which is found on Page 247 of the Convention Issue, wherein he, in effect, states the Trial Lawyers are fast disappearing. He also fully, efficiently, and eloquently replies to those who would propose to take the element of "surprise" out of a law suit.

I say to those who, in their anxiety, wish to change our practice that they read carefully and considerately Mr. Dodd's article above mentioned, as I feel as strongly on that precise question as apparently he feels. I am proud of my profession, and I am proud of being a lawyer, and I do not propose to retreat professionally in the representation of a client, notwithstanding any attempt on the part of a court to make me do so.

To paraphrase Judge Wright, I should like to observe that an attorney who is "worth his salt" will not permit himself to be nothing but an administrative agent, an errand boy, an investigator for his adversary, a "Casper Milquetoast" in disguise, but on the contrary, he will still believe in the art of advocacy, and still believe in preparing his own case fully, both as to the law and the facts, and let his adversary do the same, or in the alternative, his adversary's case will not be prepared. Certainly, I do not propose to prepare my case both as to the law and the facts, and thereafter open my file to my adversary, and thereby permit him to enjoy the fruits of my feeble labors.

I am sending Judge Wright a copy of this letter, and I am hopeful that he will receive the letter in the spirit that it is written; that is to say that I disagree with him wholeheartedly; however, I hope he will apprecate the fact that I have a right to my views the same as he has a right to his views.

Thanking you for your courtesy, I am

Very truly yours,

Lewis H. Hall, Jr.
Newport News, Virginia

The Psychologist in Today's Legal World*

DAVID W. LOUISELL**
Minneapolis, Minnesota

Introduction

ON FIVE occasions during the past several years the writer has had the opportunity of addressing meetings of psychologists on some of the current legal problems of interest to them and their profession.[1] Each meeting was followed by a question period which helped the writer to comprehend the more acute current interests and problems of psychologists, and of lawyers called upon to advise them and their professional groups, which concern the clinical practice of psychology, the conduct of litigation and judicial administration.[2] This article is a response to requests that the writer's remarks and answers to questions be reduced to permanent form. Perhaps most of this article is of primary interest to the clinical or practicing phychologist, whether full-time or part-time, but some of the problems discussed are also of interest to the phycholologist in teaching, research, industrial work, or counseling at educational institutions or otherwise.

The Psychologist as an Expert Witness

While there is no dearth of literature on existent and potential phychological devices and techniques for scientific appraisal of witnesses and diagnosis of testmony,[3] as well as on the psychology of legal practice and advocacy[4] including criminal law administration,[5] there seem

*The Insurance Counsel Journal sincerely appreciates the permission of the author to reprint this interesting article, which originally appeared in 39 Minnesota Law Review, 235.

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[1]These occasions were the fourth annual conference of the Minnesota Psychological Association, Minneapolis, May 23, 1592; two addresses sponsored by the Conference of State Psychological Associations at annual meetings of the American Psychological Association, Cleveland, September 6, 1953, and New York City, September 5, 1954; Conference of Administrators of College and University Counseling Programs, Center for Continuation Study, University of Minnesota, November 20, 1953; meeting of the Illinois Psychological Association, Urbana, April 3, 1954.

[2]For a psychologist's appraisal of some currently important legal problems faced by his profession and its practitioners, see Wiener, *Some Legislative and Legal Problems of Psychologists*, 8 The American Psychologist 564 (Oct. 1953). For a detailed report of a psychometric study of the case of a notorious murderer who was prosecuted under the Lindbergh Kidnapping Law, 18 U. S. C. § 1201, for kidnapping and killing a family of five, see Smykal and Thorne, *Etiological Studies of Psychopathic Personality: II. Asocial Type*, 7 Journal of Clinical Psychology 299 (1951). Several psychologists as well as psychiatrists apparently appeared as expert witnesses in the federal case, one of them being the author Smykal. *Id.* at 314. The federal court sentenced defendant to 300 years imprisonment. Later, defendant was prosecuted for murder by California, urged the defense of insanity, but was convicted and sentenced to death. People v. Cook, 39 Cal. 2d 496, 247 P. 2d 567 (1952). The opinion of the California court refers to testimony by "psychiatrists" and "alienists" but not "psychologists."

[3]See, *e.g.*, Munsterberg, On the Witness Stand (1908, 1923); 3 Wigmore, Evidence §§ 875, 934, 934a, 935, 997-999a (3d ed. 1940); Eliasberg, *Forensic Psychology*, 19 So. Cal. L. R. 349 (1946); Frank, *Judicial Fact-Finding and Psychology*, 14 Ohio State L. J. 183 (1953)); Wigmore, The Science of Judicial Proof §§ 310-317 (3d ed. 1937); Wigmore, *Professor Muensterberg and The Psychology of Testimony*, 3 Ill. L. R. 399 (1909) (a satiric critique of the ambitious claims for experimental psychology of Hugo Munsterberg, professor of psychology at Harvard, who wrote early in this century. A bibliography of Munsterberg's articles, some of which were reprinted in On the Witness Stand, *supra*, appears in 3 Wigmore, Evidence, § 875, n. 1, p. 368; Hutchins and Slesinger, *Spontaneous Exclamations*, 28 Co. L. R., 432, 439 (1928); Burtt, Legal Psychology, chs. II-VIII (1931); Britt, *The Rules of Evidence—An Empirical Study in Psychology and Law*, 25 Corn. L. Q. 556 (1940); Terman, *Psychology and the Law*, 4 Kans. City L. Rev. 59 (1936).

[4]See, *e.g.*, Robinson, Law and the Lawyers, (1935); Frank, Law and the Modern Mind (1930); Kennedy, *Psychologism in the Law*, 29 Geo. L. J. 139 (1940); Riesman, *Some Observations on Law and Psychology*, 19 U. Chi. L. Rev. 30 (1951); Watkins, *Jurisprudence and Contemporary Psychology*, 18 N. D. Lawyer 1 (1942); Summary of a Conference on Law and Psychology, 5 Jour. Legal Ed. (1953); Osborn, The Problem of Proof, ch. VI, (2d ed. 1926); McCarty, Psychology for the Lawyer, *passim* (1929); Britt, *The Lawyer and the Psychologist*, 36 Ill. L. Rev. 621 (1942); Vinson, *The Use of Limitations of Clinical Psychology in Studying Alleged Mental Effects of Head Injury*, 31 Tex. L. Rev. 820 (1953).

[5]See, *e.g.*, Burtt, Legal Psychology, chs. VIII-XIX (1931); Schmideberg, *Psychological Factors Underlying Criminal Behavior*, 37 J. Crim. L. & Criminology 458 (1947); Schmidl, *Psychological and Psychiatric Concepts in Criminology*, 37 J. Crim. L. & Criminology 37 (1946).

to be few cases and little recent discussion directly concerned with the psychologist functioning as an expert witness himself.[6] This of course contrasts with the vast literature concerned with the psychiatrist as an expert witness.[7] Yet the great Wigmore tells us:

> "Nevertheless, within the limitations of these special judicial rules [pertaining to partisan presentation of evidence in an adversary proceeding], judicial practice is entitled and bound to resort to all *truths of human nature established by science,* and to employ *all methods recognized by scientists* for applying those truths in the analysis of testimonial credit. Already, in long tradition, judicial practice is based on the implicit recognition . . . of a number of principles of testimonial psychology, empirically discovered and accepted. In so far as science from time to time revises them, or adds new ones, the law can and should recognize them. Indeed, it may be asserted that the Courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound, accurate and practical. If there is any reproach, it does not belong to the Courts or the law. A legal practice which has admitted the evidential use of the telephone, the phonograph, the dictograph, and the vacuum-ray, within the past decades, cannot be charged with lagging behind science. But where *are* these practical psychological tests, which will detect specifically the memory-failure and the lie on the witnessstand? There must first be proof of general scientific recognition that they are valid and feasible. The vacuum-ray photographic method, for example, was accepted by scientists the world over, within a few months after its promulgation. If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it. Both law and practice permit the calling of any expert scientist whose method is acknowledged in his science to be a sound and trustworthy one. Whenever the Psychologist is really ready for the Courts, the Courts are ready for him."[8]

While Wigmore in the foregoing paragraph seems primarily concerned with psychological techniques and devices, there, as elsewhere when he considers in detail scientific psychological diagnosis of testimony, he acknowledges that "Psychometrical data so obtained would of course have to be brought in by the expert witness obtaining them. In that respect the psychometrist would stand on the same footing as the expert witness to insanity, called under the traditional practice."[9] But we search in vain for any substantial analysis, in Wigmore or elsewhere in American legal literature, of the psychologist functioning as an expert witness. This may be due at least in part to Wigmore's, and other writers', primary concern that the law utilize as soon as feasible all available psychological techniques, devices and knowledge, and their relative indifference to whether the vehicle of such use be the psychiatric or psychological profession, or both. And the lack of adequate scholarly attention to the specific problem of the psychologist as an expert witness may also be explained by the paucity of published cases in point. In any event, the aggressive claim of the second paragraph below from *Psychiatric and Psychologic Opinions in Court* by Elias-

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[6] Articles by Rogers, *An Account of Some Psychological Experiments on the Subject of Trade-Mark Infringement,* 18 Mich. L. Rev. 75, 99 (1919), and Eliasberg, *Psychiatric and Psychologic Opinions in Court,* 39 J. Crim. L. & Criminology 152 (1948), touch on the psychologist as an expert witness. The Oct., 1935 issue of Law and Contemporary Problems was devoted to expert witness evidence, with discussions on medical and psychiatric testimony, criticisms of the adversary use of experts, and other articles. The introductory article is by Rosenthal, *The Development of the Use of Expert Testimony,* 2 Law & Contemp. Prob. 403 (1935).

[7] See, *e.g.,* Gradwohl, Legal Medicine, Ch. 31, Forensic Psychiatry, (by Satterfield), esp. 884-887 (1954); McCormick, Evidence §§ 99-100 (1954); Guttmacher & Weihofen, Psychiatry and the Law, chs. 9-11 (1952); Zilboorg, The Psychology of the Criminal Act and Punishment, ch. 7 (1954); Davidson, Forensic Psychiatry, chs. 15-23 (1952); Bychowski and Curran, *Current Problems in Medico-Legal Testimony,* 37 J. Crim. L. & Criminology 16 (1946); Criminal Responsibility and Psychiatric Expert Testimony, Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, Rep. No. 26 (1954); Barnes v. Boatmen's Nat. Bank, 348 Mo. 1032, 156 S. W. 2d 597 (1941), presents an interesting consideration of the psychiatrist functioning as an expert witness on a contingent-fee basis.

[8] 3 Wigmore, Evidence 367-368.

[9] *Id.* at 689.

berg,[10] a physician also trained in psychology, insofar as it pertains to the psychologist as an expert witness, seems as yet to find small counterpart in the published American cases:

"Great progress has been achieved in the differential psychology of testimony. The testimony of children, of boys and girls of prepubertal age, of adolescents of primitive state of mind, of morons, of dwellers in rural areas, the influence of special training, skill, social psychological ties, food, alcohol, drugs were experimentally investigated. At the same time psychology was furthered through the findings of the neurologists especially in cases of aphasia and agnosia. Here it was shown that apparently simple mental processes, as the perceptions, consist of components and that each of them may be put out of commission separately.

"Psychology, assimilating all these teachings to its own findings, has finally become a full fledged science. Small wonder, then, that it demanded to be heard and to contribute its insight to the solution of burning problems, not as a handmaiden that carries the train but, to use the famous comparison of Kant, walks ahead of her mistress and bears the torch for her."[11]

Of course the paucity of published cases involving psychologists as expert witnesses is not a certain indication of the extent to which they presently are functioning as such in the trial courts. It is rather notorious that although no American appellate court has yet approved of the judicial use of the lie detector, it is not infrequently used with consent of the parties in the trial courts.[12] But such use ordinarily produces no published judicial opinion. Several years ago in Minnesota a psychologist appeared as an expert witness for the state in a sensational murder trial[13] of an adolescent who had murdered his foster mother. Because no appeal followed the conviction in that case, there is no published transcript of the testimony nor published judicial opinion on the psychologist as expert witness.[14] One can only

[10]39 J. Crim. L. & Criminology 152 (1948).

[11]*Id.* at 153.

[12]See 35 Minn. L. Rev. 310, 311 (1951); Note [1943] Wis. L. Rev. 430, 435; note 59, *infra*.

[13]State v. Pett, District Court, Carver County, 8th Judicial District, Chaska, Minnesota (1952).

[14]The psychologist who testified at the Pett trial is Dr. William Schofield of the University of Minnesota. He has kindly permitted the writer to quote verbatim a portion of his manuscript describing his experience at the trial:

"During this same trial the writer was asked in direct examination for his opinion concerning the state of mind of the defendant. As part of this opinion, the writer expressed the judgment that the defendant was 'not insane.' At this point the defense attorney appropriately objected that the witness was not qualified to render an opinion as to the sanity of the defendant since such opinions could only be given by a psysician. The judge correctly sustained the objection, remarking gratuitously that while he was not at all sure what a psychologist was or could do, he was fully cognizant that the law of the state specified that opinions as to mental illness were the responsibility of a physician. He then instructed the jury to disregard *that portion* of the writer's previous statement in which the opinion 'not insane' was given.

"This is a particularly pertinent example of a common element of courtroom psychology! The writer's opinion in response to the question concerning the defendant's mental condition had been a lengthy statement which included observations that the defendant, in handling the various psychological examinations previously described in detail, had demonstrated that he saw the world about him as most people did and that he was capable of responding to it as most people did, that he could comprehend instruc tions and carry them out accurately, that he was in full command of a superior general intelligence, and that he revealed no gross abnormalities in his thinking processes or emotional responsiveness. It was at the end of these observations that the writer stated the summarizing opinion that the defendant was not suffering psychosis or insanity. In effect, the judge had (with legal correctness) instructed the jury to disregard the expert witness' interpretation of his findings but not the specific factual observations on which that interpretation was based. This little courtroom procedure is not *prima facie* a logical fallacy, and this particular example bears a kinship to the frequent acceptance of the clinical and other data of scientific investigators whose interpretations of the data may be eschewed."

For a psychiatrist's account of the medical evidence in the Pett case, see Michael, *Were the Medical Witnesses in the Robert Pett Case in Fundamental Disagreement?* 20 Hennepin Lawyer 103 (1952). In Minnesota a lay witness may testify as to the mental capacity of a person he has observed after testifying to the facts which he has observed and upon which his opinion is based. Cannady v. Lynch, 27 Minn. 435, 440 (1881); Geraghty v. Kilroy, 103 Minn. 286, 288, 114 N. W. 838 (1908); Johnson v. Hanson, 197 Minn. 496, 499, 267 N. W. 486 (1936); Bird v. Johnson, 199 Minn. 252, 253-254, 272 N. W. 168 (1937). In Minnesota even a medical witness, at least a general practitioner, whose expert opinion on mental capacity is based upon his observations of the subject, must fully state such observations. Scott v. Hay, 90 Minn. 304, 312, 97 N. W. 106 (1903). *Quaere*, whether the Min-

nesota Supreme Court today would hold a certified psychologist, or other psychologist professionally regarded as qualified, to be a competent full-fledged expert witness on the issue of mental capacity, if his competency were challenged by objection. *In re* Restoration to Capacity of Masters, 216 Minn. 553, 13 N. W. 2d 487 (1944) was a proceeding on petition for restoration to capacity of a woman who had been adjudged a feeble-minded person. The probate and district courts denied the petition for restoration, but the Supreme Court reversed because the district court had applied against petitioner too strict a rule as to the *quantum* of proof. One of the witnesses called in opposition to the petition was a psychologist. The transcript shows that no objection was made to the competency of his testimony. Of his testimony the Supreme Court said:

> "The psychologist . . . was not a graduate physician or psychiatrist and did not claim to be a specialist on questions of insanity. He held a master's degree from the University of Minnesota, where he had majored in educational psychology. For eight years he had been employed by the state as a psychologist for the Bureau of Psychological Service in the Division of Public Institutions, devoting most of his time to conducting tests to determine the intelligence quotient (I.Q.) of persons committed to state institutions as feeble-minded. His qualifications as an expert in this field cannot be questioned. Even laymen are entitled to express in general terms their opinions as to the condition of another's mind, upon a suitable showing that they have had an opportunity to observe the mental characteristics and habits of such other, so as to form a reasonable conclusion or inference from the facts observed. . . .
>
> "The testimony of the psychologist would have been more satisfactory, however, had he recited more fully his observations of [the woman involved] and given more details as to the character and extent of the tests to which he submitted her. Instead of asking details of the witness, counsel was content to ask merely for the witness's *ipse dixit* that [the woman involved] was a feeble-minded individual. Her mental age (M.A.), he said, was ten years and four months, her intelligence quotient (I.Q.) 64.
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> "The witness, upon direct examination, admitted that [the woman involved] 'seemed to respond quite well' to the tests, and he admitted further, on cross-examination, that while she was on the witness stand she 'did a creditable job on multiplication tables,' and that she corrected counsel when he made a mistake in questioning her. When asked, 'How many witnesses did you ever hear on the witness stand that made a better witness and answered the questions more intelligently than she did,' [the psychologist] replied, 'That is a question, of course, I cannot answer.' In fact the witness declined to take into consideration, in expressing his conclusion, her testimony from and her demeanor upon the witness stand." (*Id.* at 559-560.)

Minnesota now has a certification statute providing for the certification of certain psychologists. Minn. Stat. §§ 148.79-148.86 (1953). There is further statutory recognition of psychologists in Minnesota in that consultation by the commissioner of public welfare with a psychologist as well as with a physician is a pre-requisite to the performance of certain operations upon institutionalized feeble minded and insane persons. Minn. Stat. §§ 256.07-256.08 (1953).

speculate on the number of similar instances, which, taking the country as a whole, may be not inconsiderable.

Nevertheless, in view of the development of various branches of psychology, including its rapidly expanding clinical practice, it does seem surprising that more appellate courts have not been called upon to consider the psychologist as an expert witness. Speaking generally, this is not because the psychologist is unready for the courts. If the profession's knowledge and skill are not yet utilized in judicial administration to the full extent presently feasible and desirable, perhaps this is partly because psychologists are not yet sufficiently aggressive in displaying their wares to the courts and to lawyers. It may chiefly be because trial lawyers are not doing the creative or imaginative thinking necessary to adapt psychological developments to testimonial uses.

The psychologist, in common with other professional men, often seems to display an undue hesitancy, amounting almost to fear, to taking the witness stand. Sometimes of course such professional hesitancy is selfishly inspired by realization of the disproportionate expenditure of time in relation to the financial compensation for testifying. This is often an unjustifiable and immoral attitude which engenders public antipathy to professions whose members excessively indulge this attitude. The very definition of a profession implies public service as well as profit, and professional *noblesse oblige* dictates performance of obligations to judicial administration as not the least of the public services. However, the psychologist's hesitancy to take the witness stand more often seems to be inspired by an unreasonable concern over cross examination, a fear of ridicule or harsh treatment typified by the cinema version of trials with its incessant "answer 'Yes' or 'No' ", or a lack of confidence in his ability to communicate adequately in semantics comprehensible by non-phychologists. While such hesitancy is understandable, and such concerns not wholly lacking in foundation, they often proceed from a distorted notion of modern litigation and the true function of the expert wit-

ness in it. Therefore it may be profitable briefly to consider the basis for expert testimony in relation to the psychologist's potential contribution to judicial administration.

Bratt v. Western Air Lines[15] represents what may be characterized as the "modern common-sense" approach to the problem of the expert witness and his contribution to judicial fact ascertainment. That was a suit to recover for the death of an airplane passenger who lost his life in a crash which killed the entire crew and all but one of the passengers. The flight crew were highly trained and qualified, and the air was smooth and weather conditions favorable. The crash was apparently caused by a structural failure in flight. However, it was defendant company's position that the crash was not caused by any mechanical or structural defect of the plane, or any other cause within its control. In an attempt to show that a defective and unsafe right horizontal stabilizer of the plane was the proximate cause of the crash, plaintiff offered the evidence of an aviation mechanic. There was extensive examination and cross examination pertinent to the mechanic's qualifications as an expert. The court of appeals summarized this testimony:

> ". . . He [the mechanic] became interested in aviation in 1927 and since that time has owned three planes of his own; he has flown numerous types of planes including multi-engine and twin-engine aircraft, and has approximately eleven hundred air hours to his credit. The only time he has flown a DC-3 (the type here involved) was after it was taken into the air by a qualified pilot who let him then take the controls. He has never had a commercial pilot's license, but has held a private license and now holds a student's license. In 1943 he worked eleven months for Western Airlines as an 'apprentice mechanic' and is now employed as an aviation mechanic by the Thompson Flying Service. His work with the Western Airlines required a general knowledge of aircraft and as a part of his duties he did general maintenance work, including inspection and repairs. He has not been certified by Federal authorities and therefore never signed any Civil Aeronautics Authority forms as an official inspector, but made them out under the supervision of a licensed 'A & E.' He has studied the 'C.A.A.' manuals and Western Airlines maintenance manuals and read other literature pertaining to the operation, maintenance and construction of DC-3 equipment. He has studied aerodynamics through study courses and classroom work, having attended a class at least once a week for over two years, in addition to manuals and books published for the 'C.A.B.' He stated that he had studied 'load factors and structural aerodynamics;' that he knew metals and had experimented with heat alloy. He also examined the wreckage of the plane at the point of the accident. Over objections of counsel, the court permitted him to describe the purpose of ailerons, stabilizers and rudders, and to discuss the various parts and structures of an airplane with reference to their purpose and function in flight . . ."[16]

However, the trial court would not permit this witness to answer the following question:

> ". . . Now taking into consideration your own knowledge and experience and the evidence that I have mentioned—the weather records, the photographs, barograph card—and assuming the testimony of Lt. Gardner [sole survivor of the crash] to be true, I will ask you whether or not you were able to form or express an opinion with a reasonable degree of certainty as to whether the right horizontal stabilizer and the elevator with it was the first part of the first section of this plane to fail in flight?"[17]

To that question the trial court sustained an objection made by defendant's counsel on the ground that the witness was not qualified to render such an opinion. The jury returned a verdict for defendant. This ruling of the trial court was one of the reasons the court of appeals reversed the case and remanded it for a new trial.

In respect of the scope of expert testimony and the qualifications of a witness

[15] 155 F. 2d 850 (10 Cir. 1946).

[16] *Id.* at 852-853.

[17] *Id.* at 852.

to speak as an expert, the court of appeals quoted from American Law Institute, Model Code of Evidence: "A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify, requires special knowledge, skill, experience or training and that the witness has the requisite special knowledge, skill, experience or training."[18] The court of appeals then pointed out that the trial court's refusal to let the aviation mechanic give his opinion, was apparently based on its impression that a witness to be competent to give such an opinion "must have either experienced an accident of this kind, or be an 'expert who had figured it out mathematically and had taken into consideration every factor' that goes to the use of the various parts of an airplane." After rejecting as a requirement personal involvement in such an accident "because as we all know, few ever survive to relate their experience"[19] the court of appeals pointed out that a witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research. It then stated:

> "The witness had no scholastic standing in the science of aerodynamics, but he was a man of practical experience who said he had made an actual study of the structural stress and strain of the parts of an airplane, and that based upon his examination of the wreckage at the point of the accident and other facts available to him, he had an opinion concerning which of the parts of the plane structurally failed first in flight, and was therefore the proximate cause of the accident. It may be that his testimony was of little value when judged by the substance of direct testimony, or when compared with the testimony of those whose opinions are steeped in the lore of scientific research. But, 'the law does not require the best possible kind of a witness.' . . . The testimony of a country doctor concerning the sanity of his patient is as readily admissible as the testimony of the most renowned phychiatrist."[20]

The court then enunciated what to this writer is the essence of the "modern common-sense" approach to expert testimony: will such testimony as a practical matter aid the tribunal in finding out the truth?

> "It must be remembered that the court is not the judge of the quality of evidence, nor does the witness perform the function of a juror—he can only contribute something to the jury's information and if he can, he should be permitted to do so. Especially is this true, where as here the answer to the crucial question is necessarily left to those claiming special knowledge based upon experience. . . ."[21]

An outstanding authority in his most recent work, McCormick on Evidence,[22] neatly and succintly puts the rationale of expert evidence:

> "An observer is qualified to testify because he has first hand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert evidence, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both. . . ."[23]

Do not issues often arise in modern litigation as to which the psychologist has "a power to draw inferences from the facts which a jury [or judge, for that matter,

[18] Rule 402.

[19] Bratt v. Western Air Lines, 155 F. 2d 850, 853 (10 Cir. 1946).

[20] *Id.* at 853-854. It should of course be noted that the last sentence respecting a country doctor and a psychiatrist refers to admissibility and not probative value or weight.

[21] *Id.* at 854.

[22] McCormick, Evidence (1954).

[23] *Id.* at 28-29; see Davis, Administrative Law 466 (1951).

sitting without a jury] would not be competent to draw"? The answer is certainly in the affirmative to an extent not indicated by the published cases. In the field of mental abnormality alone—psychoses or insanity, mental incompetence, mental illness, various gradations of mental retardation—to name but one general category of psychology's competence, one would expect to find a substantial number of cases in which a psychologist had appeared as an expert witness. But in contrast to the innumerable cases wherein a psychiatrist has functioned as an expert witness in this field, the published opinions seemingly have little to say about the psychologist in this role.

People v. Hawthorne,[24] however, is a case directly in point. It was a prosecution of defendant for homicide for killing his wife's paramour. The defense was insanity. Defendant's counsel introduced in evidence the testimony of a physician, who testified as an expert, and several lay witnesses, who testified with regard to their opinions of defendant's insanity from observations of his conduct and actions. Defendant's counsel also sought to qualify, as an expert witness on insanity, a professor of psychology from the Michigan State Normal College. This psychologist was a graduate of several educational institutions and held the degrees of Bachelor of Arts, Master of Arts, Bachelor of Divinity and Doctor of Philosophy in Psychology. He had done graduate work at the University of California, Columbia University, Boston University, Harvard University Medical School, and the Boston Psychopathic Hospital. He had been a full professor at several universities before becoming affiliated with the Michigan State Normal College, where he had been eleven years up to the time of the trial. He had given courses in normal and abnormal psychology, experimental psychology, educational psychology, mental tests and measurements, psychology and criminology, problems in marriage and family, and problems of child-welfare. One of his texts had been through five editions. He had written articles on the subject of human behavior that appeared in publications throughout the United States. He specialized in the particular field of psychology devoted to motivation and motives of human conduct. He was not of course a practicing physician nor a graduate of a medical college. He had never treated insanity nor was he licensed to practice medicine in any form. However, he had knowledge of the anatomy of the brain, having studied physiological psychology and neurology. He had given insanity and diseases of the brain special study.

The trial court sustained the prosecuting attorney's objection to the competency of this psychologist as an expert on insanity, although it did give the defense an opportunity to recall the psychologist, who had known the defendant as a college student, to testify as to any observations while in contact with the defendant and any conclusions. On appeal to the Supreme Court of Michigan, one of defendant's principal contentions was that the trial court had erred in holding the Psychologist to be incompetent as an expert on insanity. Three justices of the supreme court, who concurred in an opinion which on the other issues in the case is the opinion of the court, thought that the trial court was correct in this holding. On this point, after briefly summarizing the psychologist's qualifications, they said only:

> ". . . Insanity, however, is held to be a disease, . . . and, therefore, comes within the realm of medical science, which comprises the study and treatment of disease. Only physicians can qualify to answer hypothetical questions as experts in such science. The court was not in error in excluding the testimony sought to be offered."[25]

The remaining five justices, a majority of the eight constituting Michigan's Supreme Court, held diametrically contrary views on the psychologist's competency as an expert witness. Speaking through Butzel, J. they said in part:

> "I concur in affirmance, but I cannot agree with the proposition of my brother McAllister that because insanity is a disease and comes within the realm of medical science that only physicians are competent to answer hypothetical questions on behalf of a defendant in a criminal case. The law does not require a

[24] 293 Mich. 15, 291 N. W. 205 (1940). See also *in re* Restoration to Capacity of Masters, 216 Minn. 553, 13 N. W. 2d 487 (1944).

[25] 293 Mich. 15, 20, 291 N. W. 205 (1940).

rule so formal, and I do not think we further the cause of justice by insisting that only a medical man may completely advise on the subject of mental condition. . . .[26]

". . . I do not think it can be said that his [the psychologist's] ability to detect insanity is inferior to that of a medical man whose experience along such lines is not so intensive.[27]

". . . No case has been called to my attention where a general medical training has been held to be the *sine qua non* of the competency of a trained specialist to advise on the matter of insanity. . . .[28]

". . . There is no magic in particular titles or degrees and, in our age of intense scientific specialization, we might deny ourselves the use of the best knowledge available by a rule that would immutably fix the educational qualifications to a particular degree."[29]

Nevertheless the five justices who expressed the foregoing views also concurred in the affirmance of the judgment of the trial court because they thought that the prejudicial effect of any error of the trial court was removed when that court gave the defense an opportunity to recall the psychologist to testify as to any observations while in contact with the defendant and any conclusions.[30] To complete the picture of this case, it should also be noted that the five justices, though thoroughly convinced that a qualified psychologist may be a competent expert witness on insanity, nevertheless stated the caveat that "when a nonmedical is offered as an expert on subjects in the orbit of medical science, the trial court is put on guard and should take greater precaution in the preliminary inquiry to determine the witness's qualifications and the extent of his knowledge than might be necessary when a graduate of a medical school is proposed."[31]

Another case from an eminent court, *People v. Rice*,[32] although not directly pertinent in that it did not involve a psychologist, is significant as indicating that the physician, while legally favored as an expert witness on insanity, is not the only specialist capable of being such a witness. That case was also a prosecution of defendant for homicide, with a defense of insanity. The witness called by defendant on the issue of insanity was not a doctor of medicine but a manufacturer of medicines and publisher of medical books. He had studied to some extent medicine and nervous diseases. The trial court held that he was not competent as an expert although he could be examined as a layman. New York's highest court, the Court of Appeals, affirmed the trial court on the ground that the witness had not been sufficiently qualified as an expert. However, the court said:

"After a careful consideration of the subject we have reached the conclusion that if a man be in reality an expert upon any given subject belonging to the domain of medicine, his opinion may be received by the court, although he has not a license to practice medicine. But

[26] *Id.* at 22.

[27] *Id.* at 23.

[28] *Ibid.*

[29] *Id.* at 25.

[30] In view of this opportunity afforded the defense by the trial court, it appears that from a realistic viewpoint the defense actually had the chance to use the psychologist as an expert except that it was precluded from use of a technique commonly used to adduce expert evidence, namely, the hypothetical question.

[31] 293 Mich. 15, 24-25, 291 N. W. 205 (1940); *cf.* Frederick v. Stewart, 172 S. C. 188, 173 S. E. 623 (1934), where the contention was rejected that before a physician could classify a person as a moron he had to be given certain psychological tests by a psychiatrist or a psychologist. 172 S. C. at 194-195. In United States v. Chandler, 72 F. Supp. 230 (D. Mass. 1947), *aff'd*, 171 F. 2d 921 (1st Cir. 1948), *cert. denied*, 336 U. S. 918 (1949), a prosecution for treason, after defendant's counsel made a motion to inquire into the sanity of the defendant on the ground that he was unable to understand the charges against him, the district court ordered defendant transferred to a government hospital for a mental examination. There he was examined by psychiatrists for the government, and by a psychologist for the defense. The opinion states that all the experts testified at length, but the psychologist's testimony is not detailed. 72 F. Supp. at 237. Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 684 (1942), was a suit for malpractice resulting in the ruination of a child in its mother's womb caused by X-ray applications. The majority of the court held there was no legal liability for negligently causing harm to an unborn child. Colie, J., while disagreeing with that holding, concurred in reversal of plaintiff's judgment because one of plaintiff's experts based his opinion in part on hearsay. This expert was "a doctor of philosophy with extensive experience in the field of psychology and connections with many institutions handling mental deficients." *Id.* at 460. The opinion analyzes the hearsay problem without distinguishing between this psychologist and a doctor of medicine.

[32] 159 N. Y. 400, 54 N. E. 48 (1899).

such testimony should be received with great caution, and only after the trial court has become fully satisfied that upon the subject as to which the witness is called for the purpose of giving an opinion, he is fully competent to speak. The witness Fenner was not *prima facie* competent, for he had not been licensed to practice medicine. It was essential, therefore, to prove him to be an expert before the defense acquired the right to have him testify as to the sanity or insanity of the defendant."[33]

Psychology's purported competence in respect of mental status or processes is of course not limited to the mind which deviates from the normal because of psychoses or mental retardation. Often in litigation the status of the normal mind is the pivotal issue, as for example when the intention of a party is legally controlling or significant on the issue involved. *People v. McNichol*[34] was a prosecution for issuing a worthless check. The defense was that defendant on the day involved, without eating any breakfast, had consumed a pint of whiskey and four cans of beer, and that he had no recollection of what his conduct was at the time of the alleged offense. Prior to his trial defendant had been examined by a clinical psychologist who had subjected him to an examination while defendant was under the influence of sodium pentathol, a so-called truth serum. During the trial defendant sought to introduce in evidence a report of statements he had made during this examination, but this testimony was excluded by the trial court. However, the clinical psychologist did testify at the trial, in response to hypothetical questions, that one who had consumed the quantity of liquor defendant had consumed would not be conscious of an intent to do an act to obtain money—that his intent would not be a conscious intent. He also testified that subconscious matter might be brought out by putting the party into an hypnotic state by the administration of sodium pentathol; that he had so treated the defendant and that during the treatment notes had been made of what was said by defendant. But, as stated, the trial court would not permit the psychologist to state the context of these notes. The trial court's judgment of conviction of defendant was affirmed despite defendant's contention that such exclusion of the notes was error. There is no suggestion in the opinion of the appellate court that it was wrong for the trial court to permit the clinical psychologist to testify to the extent indicated above.

There is no reason why psychology's potential contribution to judicial fact ascertainment should be limited to criminal jurisprudence. *United States v.* 38 *Dozen Bottles*[35] was a seizure action brought under the Federal Food, Drug and Cosmetic Act[36] charging that the drug "Tryptacin" was misbranded by reason of failure of its labeling to bear adequate directions for use. One issue was whether a newspaper advertisement of the drug conveyed the impression that the drug was offered as a cure for ulcers. In holding that it did, the court depended in part on the testimony of experts in the field of advertising and marketing psychology. The court said:

> "In addition to reading and examining the advertisement, I base my finding as to the impression conveyed by the advertisement upon the evidence presented on that point. Libelant's witnesses, Dr. James N. Mosel and Dr. Howard P. Longstaff, experts in the field of advertising and marketing psychology, presented exhaustive analyses of the content of the advertisement and the effect which it was intended to have upon the prospective purchaser of the drug. Such testimony is admissible to determine the meaning of an advertisement. Federal Trade Commission v. National Health Aids, Inc., D. C. Md., 108 F. Supp. 340.
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> "Moreover, Dr. Mosel introduced evidence relative to two hundred individuals whom he surveyed concerning the impression which they received from the 'Tryptacin' advertisements. A substantial portion of those interviewed indicated that they received the impression from the advertisement that 'Tryptacin' would 'stop', 'cure' or otherwise bring about some permanent relief of ulcers. The forms filled out by the individuals

[33] *Id.* at 410-411. See Fox v. Peninsular White Lead & Color Works, 92 Mich. 243, 249 (1892), where a non-physician was allowed to give his observations as to cutaneous diseases resulting from chemicals.

[34] 100 Cal. App. 2d 554, 224 P. 2d 21 (1950).

[35] 114 F. Supp. 461 (D. Minn. 1953).

[36] 21 U. S. C. § 301 *et seq.* (1952).

questioned, interview cards, and tabulations made by Dr. Mosel of the answers received, were placed in evidence by libelant."[37]

Claimant's opposing evidence on the import of the advertisement's language included testimony of two representatives of a firm which handled the drug's advertising. These advertising men testified that in their opinon the advertisement offered the drug as a means of relieving acid pain and not of curing stomach ulcers. They also testified that they had showed the advertisement to a number of their associates in the advertising business, newspaper censorship boards and other persons, and inquired as to the impression the advertisement made; and that not a single person questioned received the impression that the advertisement offered a cure for stomach ulcers. There was similar testimony by doctors, who had discussed the meaning of the advertisement with other doctors, nurses, patients and others. Claimant's evidence obviously did not impress the court as cogently as libelant's did, possibly because claimant's had not been accumulated and presented in accordance with recognized scientific criteria for valid testing procedures. In any event, the court said of claimant's evidence:

> ". . . The likelihood of error or prejudice developing in the course of such interviews would seem to be great, particularly since none of the witnesses of claimant, including both advertising men and doctors, were qualified by education or experience in the taking of formal public opinion surveys."[38]

Thus the psychologist's training in statistics and scientific techniques necessary to validate testing procedures would seem to give him an advantage in certain kinds of expert testimony not necessarily possessed by the businessman or other professional men.

There is currently pending before Chief Judge Gunnar H. Nordbye in the United States District Court for the District of Minnesota an anti-trust suit[39] for treble damages brought by a theatre owner against a number of movie distributors. One of the plaintiff's claims is that it should have a position in the movie distribution scheme, a so-called playing position, better than the typical neighborhood theatre. Plaintiff called a psychologist as an expert witness to establish the range and degree of competition between plaintiff and other theatres and to show the drawing power of plaintiff's theatre. In view of the apparent paucity of published material on the actual functioning of the psychologist as an expert witness, it may be valuable to make available both to the legal and psychological professions the testimony of that psychologist. (The transcript of this testimony on both direct and cross examination is printed as an appendix to Professor Louisell's article in 39 Minnesota Law Review, beginning at page 259.)[40]

There is a group of cases which, superficially viewed, might be construed in derogation of psychology's claims to competence to provide expert witnesses. This superficial view, however, yields to precise analysis which shows that these cases turn

[37] 114 F. Supp. at 462-463. For a discussion of the hearsay problem involved in the testimonial use of public opinion surveys, see 37 Minn. L. Rev. 385 (1953).

[38] 114 F. Supp. at 463.

[39] Robbinsdale Amusement Co. v. Warner Bros. Picture Distributing Corp., Civil No. 4584 (4th Division, Minneapolis).

[40] There may be a rich vein, not exhausted by this writer, for further research into the possible previous use of psychologists as expert witnesses, in the records of Federal Trade Commission, trade mark and perhaps patent cases. As early as the dawn of this century it was clearly recognized that the resolution of such issues as confusion between marks in trade mark cases could be facilitated by psychological techniques. See Rogers, *The Unwary Purchaser. A Study in the Psychology of Trade Mark Infringements*, 8 Mich. L. Rev. 613 (1910). It may be that behind the general reference to "expert evidence" in appellate opinions in trade mark cases, there are records wherein the experts were psychologists. See Burtt, Legal Psychology, Ch. XX, p. 424, Trade-Mark Infringement (1931). In Coca-Cola Co. v. Chero-Cola Co., 273 Fed. 755 (App. D.C. 1921), on the issue of whether marks were so similar as to be likely to cause confusion in the public mind or to deceive a purchaser, the court made only a passing reference to the testimony in the opposition proceedings in the Patent Office on application for registration of "Chero-Cola," saying "Nearly 3,000 pages of testimony were taken, and elaborate briefs have been filed. Many decisions by courts in this country and in England are cited, and, besides, we are invited to listen to the teaching of psychology on the subject." (273 Fed. at 756.) But we know from Rogers, *An Account of Some Psychological Experiments on the Subject of Trade-Mark Infringement*, 18 Mich. L. Rev. 75 (1919), that elaborate psycholcgical tests were made by an experimental psychologist and submitted to the trade mark examiner in the form of a report by the psychologist, formal proof of the report having been waived. The report, although objected to, was received, and commented on at length by the examiner. 18 Mich. L. Rev. at 99-103.

upon some refined evidential rule, usually concerned with impeachment or character evidence, and properly have no derogatory connotation respecting the psychologist as an expert witness. Typical is *State v. Driver*,[41] where defendant was convicted of an attempt to commit rape upon a girl twelve years old. When this girl was offered as a witness for the state defendant objected to her competency on the ground that she was a "moral pervert, and not trustworthy." However, she was allowed by the trial court to testify, and defendant attempted to impeach her testimony by evidence from the chief psychologist of the Ohio Bureau of Juvenile Research to the effect that the girl was "a lying moron and unworthy of belief." The West Virginia Supreme Court affirmed the conviction, holding that the trial court's preclusion of this impeachment was proper, thus limiting impeachment of a witness' truth and veracity to the conventional method of showing poor community reputation for those qualities. Whatever is thought of the court's restriction of impeachment to the orthodox method,[42] the decision clearly is not a rejection of the psychologist *per se* as an expert witness; in fact in the same case a physician's testimony was similiarly rejected as improper impeachment. In *People v. Villegas*,[43] where defendant was charged with armed robbery, his defense was that he was coerced into participation by his co-defendant who threatened him and menaced him with a gun. Defendant called a witness whom he attempted to qualify as a psychologist. Defendant offered to prove that the psychologist had known defendant for fourteen years and that by reason of her study of psychology she was in a position to testify that defendant's will power was weak, that his physical condition was bad, and that he therefore was without sufficient force to "resist the impulse of this other boy to take him out on these robberies."[44] In affirming the trial court's preclusion of this testimony, the appellate court said simply:

> ". . . It was both incompetent and immaterial, and she [the psychologist] was entitled only to testify, as she was permitted under the court's ruling to do, concerning the general reputation of appellant [defendant] in the community in which he lived for the traits involved in the offense charged."[45]

Thus the court was unwilling, as a matter of evidence law, to permit the defendant in a criminal case to do more, in respect of so-called character evidence, than make the conventional showing that he has a good community reputation for the traits involved in the crime charged.[46] There is in the case no necessary deprecation of a psychologist *per se* as an expert witness.

In the well-known case of *United States v. Hiss*[47] the trial judge who presided at the second trial permitted testimony offered by the defense, in an attempt to impeach the credibility of a principal government witness, which did not fall into the conventional impeachment pattern to which the West Virginia court adhered in *State v. Driver*. In the *Hiss* case both a psychiatrist and a psychologist were permitted to testify over government objection that such witness was in their opinion a psychopathic personality.[48] The psychologist who so testified also had the degree of doctor of medicine, but he was from the Harvard Psychological Clinic, had worked for many years in psychology and testified, "I would call myself a psychologist."[49] The

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[41] 88 W. Va. 479, 107 S. E. 189 (1921).

[42] Wigmore insisted that *"No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."* 3 Wigmore, Evidence 460. Is it a significant indication of his thinking that he refers in this connection only to a "qualified physician"?

[43] 29 Cal. App. 2d 658, 85 P. 2d 480 (1938).

[44] *Id.* at 663.

[45] *Ibid.*

[46] *Cf.* People v. Jones, 266 P. 2d 38 (Cal. 1954). In that case defendant was charged with lewd acts upon the person of his young niece. At his trial defendant offered the evidence of a psychiatrist that he had examined defendant twice, once without drugs and once with sodium pentathol, and that defendant was not a sexual deviate. The trial court rejected this offer on the ground that it did not constitute proper character evidence. The California Supreme Court, however, held that this testimony should have been admitted as evidence of good character showing defendant's disinclination to this type of crime. See Falknor and Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U. of Pa. L. Rev. 980 (1954).

[47] 185 F. 2d 822 (2d Cir. 1950), *cert. denied*, 340 U. S. 948 (1951), *on motion for a new trial*, 107 F. Supp. 128 (S.D. N.Y. 1952), 201 F. 2d 372 (2d Cir. 1953), *cert. denied*, 345 U. S. 942 (1953).

[48] Transcript of Record, United States v. Hiss. pp. 2550, 2812.

[49] *Id.* at 2800.

brief opinion of the trial court[50] permitting this method of impeachment, and refusing to follow *State v. Driver,* was written in reference to the testimony of the psychiatrist, but the decision to admit the psychiatrist's testimony apparently also settled the question of admissibility of the psychologist's testimony.

The psychologist is discouraged sometimes by what he interprets to be an unduly slow acceptance by the courts of his claim to an expertise which can be helpful in judicial fact ascertainment. He should remember, however, that the conservatism of the law is at least in part dictated by its preoccupation with vital issues of property, liberty and even human life itself, and not academic debate. A certain amount of cultural lag is perhaps inevitable. Until a new technique or device is accepted as accurate and reliable in its own scientific orbit, it can hardly be expected to play a role in disposing of men's property, liberty or lives. And quite reasonably, the accuracy and dependability of the technique or device must appear to the court's satisfaction. When the scientific validity of a new technique or device is accepted as "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy,"[51] the courts reasonably may be expected to take judicial notice of such acceptance and permit judicial use of the technique or device unless there is a valid reason for exclusion despite scientific acceptance.[52] The absence of such scientific acceptance does not necessarily mean that the technique or device is untrustworthy. But such absence does mean that the proponent of the technique or device for judicial use must affirmatively establish by evidence the fact of dependability. Thus, when a party calls a psychologist as an expert witness in a domain as to which psychology's expertise does not yet enjoy such scientific acceptance, the burden is on that party to prove that psychology does have pertinent expertise in the field involved.

This is well put in *Frye v. United States.*[53]

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deducted from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. . ."[54]

Often courts are willing or even eager to accept so-called amicus curiae briefs from persons or associations not directly involved in the pending litigation who have nevertheless an interest in its adjudication.[55] Psychologists or their professional associations which have an interest in judicially establishing the competence, reliability and trustworthiness of a particular psychological technique or device may from time to time have the occasion to submit such a brief to a court. Naturally the effectiveness of such a brief is dependent upon the thoughness, accuracy and scholarly quality of the scientific data it marshalls in support of its thesis. Such a brief to be effective requires close collaboration between the lawyers and the scientists whose technique or device is involved.

The history of judicial treatment of various scientific devices should give encouragement to scientists inclined to think judicial steps toward acceptances of their

[50]88 F. Supp. 559 (S.D. N.Y. 1950).

[51]Uniform Rules of Evidence, National Conference of Commissioners on Uniform State Laws, Rule 9(2) (d).

[52]This paper is not concerned with exclusion of evidence on constitutional or other policy grounds without regard to scientific validity of the evidence, *e.g.,* U. S. Const. Amend. V's provision that no person "shall be compelled in any criminal case to be a witness against himself" or "be deprived of life, liberty, or property, without due process of law." and analogous state provisions. Illustrative cases are State v. Cram, 176 Ore. 577, 160 P. 2d 283 (1945); Rochin v. California, 342 U. S. 165 (1952); see McCormick, *op. cit. supra* note 22, at 264 298.

[53]293 Fed. 1013 (App. D.C. 1923).

[54]*Id.* at 1014. That the law's conservatism in accepting new psychological data, techniques and devices is not without roots in logic and sound policy, see Kennedy, *Psychologism in the Law,* 29 Geo. L. J. 139 (1940); Terman, *Psychology and the Law,* 4 Kansas City L. Rev. 59 (1936); *cf.* Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 Minn. L. Rev. 671, 695 (1937); Britt, *Blood-Grouping Tests and More "Cultural Lag,"* 22 Minn. L. Rev. 836 (1938).

[55]See, *e.g.,* Revised Rules, Supreme Court of the United States, Rule 42. Briefs of an Amicus Curiae (effective July 1, 1954).

wares too desultory. Not long ago courts were rendering decisions of paternity in illegitimacy proceedings against men whose innocence was scientifically established by the exclusory nature of the blood tests. Now, however, the courts are holding that where it is shown that the testing processes were accurate, exclusory results from blood testing must be deemed conclusive.[56] The "drunkometer" may be on its way to judicial acceptance,[57] and the so-called truth serum is making its claims.[58] While the lie detector, in the absence of stipulation for its use, has not yet been accepted by any American appellate court, the judicial attitude toward it may fairly be said to be a friendly one of "waiting to be shown"; in fact, the courts have gone as far in accepting it as its most prominent proponents would have them.[59]

Perhaps, therefore, there is an attitude among scientific men including psychologists too prone to be critical of the courts for their conservatism respecting scientific data and devices, and judicial treatment of the expert witness. Recently a psychiatrist, in reviewing the much-discussed *Psychiatry and the Law*,[60] made certain observations which, though specifically directed to psychiatrists, are not impertinently applied to other professional experts, including some psychologists. He said:

> "The authors [of *Psychiatry and the Law*] disapprove of the current legal definition of insanity. It is true that many psychiatrists object to being pinned down to a *yes* or *no* answer, but I think it is a godsend that there are at least some situations where phychiatrists are forced to give a simple answer to a simple question. Social living, with which the law deals, makes this necessary. Instead of the test of the 'irresistible impulse' the authors suggest 'inability to adhere to the right.' This would describe most people as well as most mur-

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[56] *Compare* Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P. 2d 442 (1946), *with* Jordan v. Mace, 144 Me. 351, 69 A. 2d 670 (1949) and United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674 (D.C. N.Y. 1954). See McCormick, *op. cit. supra* note 22, at 378-383; 35 Minn. L. Rev. 515 (1951).

[57] See Note, *Drunkometer as a Test for Intoxication*, 24 Rocky Mt. L. Rev. 253 (1952); McCormick, *op. cit. supra* note 22, at 375-377.

[58] See Dession, Freedman, Donnelly and Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 Yale L. J. 315 (1953); McCormick, *op. cit supra* note 22, at 375-375; Note, 23 A. L. R. 2d 1306, 1310 (1952).

[59] All American appellate courts called upon to decide the question have held lie detector test results inadmissible in evidence, in the absence of a stipulation between opposing counsel authorizing admission. Frye v. United States, 293 Fed. 1013 (D. C. Cir. 1923); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933); 18 Minn. L. Rev. 76; People v. Forte, 279 N. Y. 204, 18 N. E. 2d 31 (1938); People v. Becker, 300 Mich. 562, 2 N. W. 2d 503 (1942); State v. Cole, 354 Mo. 181, 188 S. W. 2d 43 (1945); State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947); Boeche v. State, 151 Neb. 368, 37 N. W. 2d 593 (1949); State v. Pusch, 77 N. D. 869, 46 N. W. 2d 508 (1950); People V. Wochnick, 96 Cal. App. 2d 124, 219 P. 2d 70 (1950); Henderson v. State, 94 Okla. Cr. 45, 230 P. 2d 495 (1951). *But cf.* People v. Kenney, 167 Misc. 51, 3 N. Y. S. 2d 348 (County Ct. 1938); see 35 Minn. L. Rev. 310, n. 3. The cases are discussed in a series of A. L. R. Annotations: 34 A. L. R. 147 (1925); 86 A. L. R. 616 (1933); 119 A. L. R. 1200 (1939); 139 A. L. R. 1174 (1942); 23 A. L. R. 2d 1306 (1952). In one of the recent cases, the Minnesota Supreme Court reversed a conviction for arson because the trial court permitted the state to show that defendant had refused to submit to a lie detector test. State v. Kolander, 236 Minn. 209, 52 N. W. 2d 458 (1952). In a careful opinion for the court, Knutson, J. said: "We have no doubt that the lie detector is valuable in investigative work of law enforcement agencies and may frequently lead to confessions or the discovery of facts which may ultimately lead to the solution of many crimes; but we are in accord with the rule that the lie detector has not yet attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of results shown therefrom, as to justify submission thereof to a jury as evidence of the guilt or innocence of a person accused of a crime." 236 Minn. at 221-222. *Cf.* Tyler v. United States, 193 F. 2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U. S. 908 (1952). Results of a lie detector test have been admitted pursuant to stipulation, which precludes a claim of inadmissibility on appeal, People v. Houser, 85 Cal. App. 2d 686, 193 P. 2d 937 (1948). *Compare* Le Fevre v. State, 242 Wis. 416, 8 N. W. 2d 288 (1943), which ignored a stipulation in excluding results, *with* State v. Lowry, *supra*, which emphasized that no stipulation was involved; see 35 Minn. L. Rev. 311 (1951); [1943] Wis. L. Rev. 430; 23 A. L. R. 2d 1306, 1311 (1952). The writer in recent years has noticed newspaper reports to the effect that trial courts have used lie detector tests for various purposes. See [1943] Wis. L. Rev. 430, 435; McCormick, *op. cit. supra* note 22, at 370, n. 6. Inbau as recently as 1946 seemed to favor admission in evidence of lie detector test results only pursuant to stipulation. Inbau, *The Lie-Detector*, 26 B.U.L. Rev. 264, 271 (1946); *compare* McCormick, *op. cit. supra* note 22, at 371-373, esp. 372, n. 13.

[60] By Guttmacher and Weihofen. (1952). For a laudatory appraisal, see Book Review, Hall and Menninger, 38 Iowa L. Rev. 687 (1953).

derers.[61] There is room for critical discussion of the different legal definitions of insanity. But this book is a good example of the unfortunate tendency to emphasize this point as if it were the main trouble with present-day forensic phychiatric usage. Instead of putting their own house in order, phychiatrists like to claim that most, if not all, that is wrong are the legal definitions. Throughout this book the impression is given that the lawyers are backwards and psychiatrists progressive. Many lawyers, judges and district attorneys would like to get psychiatric advice and help, as well as treatment, for defendants. Their main trouble is to get psychiatrists in cases where large fees are not available. They have much less difficulty with other medical specialties."[62]

Generalizations are dangerous, and many lawyers including the writer will react to the above criticism with numerous instances they have observed of psychiatrists grappling with problems as difficult and complex as the human mind must face, with a consummate skill and soul-searching conscientiousness and selflessness that is the ideal for professional service. But all professions, including psychology, may well bear in mind the wholesome admonition of the master psychologist:

> "The fault, dear Brutus, is not in our stars,
> But in ourselves, that we are underlings."[63]

Psychologists have often asked the writer questions on a very practical level as to the appropriate method and demeanor of a psychologist called as an expert witness. The varying conditions of judicial administration from place to place in the United States, including the different philosophies, attitudes, temperaments and capacities of trial judges, make generalizations hazardous. The following observations, however, are confidently ventured. The qualified, careful, scholarly psychologist, who sticks to his own field of competence, has nothing to fear in taking the witness stand. Such an expert has no reason to stand in awe of cross examination. If a question can accurately and simply be answered "Yes" or "No", no witness, not even a scientist, should resent judicial insistance that it be so answered. If it cannot fairly be so answered, no reasonable tral judge is going to insist upon such an answer.

The prudent psychologist will, before taking the stand, carefully explain to the lawyer of the party invoking his services what he can and what he cannot honestly state under oath. He will realize that he is not an advocate but a witness. If called by the court as a neutral witness, he will realize that he is even more removed from the spirit of advocacy than when functioning as a partisan witness.[64] He will be

[61] But see Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954).

[62] Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 Buffalo L. Rev. 41, 48-49 (1953).

[63] Shakespeare, Julius Caesar, Act 1, sc. ii. That much of the antipathy of the scientist to the judicial process is rooted in confusion resulting from the differing semantics of the scientist and jurist, is a theme pursued in a later installment of this article.

[64] One of the most common criticisms of expert testimony, especially medical and psychiatric testimony, is its partisan source and nature. See, *e.g.*, Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 Law & Contemp. Prob. 419, 420 (1935); Bychowski and Curran, *Current Problems in Medico-Legal Testimony*, 37 J. Crim. L. & Criminology 16, 31 (1946). The writer is not entirely sympathetic with the prevailing view that the use of the so-called neutral or court-appointed expert is a reform which will substantially solve the evils of expert testimony. This view reaches its extremity in Zilboorg, The Psychology of the Criminal Act and Punishment (1954), where the author, a psychiatrist, stated: "The principle of an expert for each side is a corrupting, immoral principle. . . ." *Id.* at 119. So far as this writer knows, no one has satisfactorily demonstrated why the especial competence of the adversary system as a fact-finding device is so vitiated because the subject of inquiry is a scientific question. Too often it is assumed that there is some magic in the mere shifting of responsibility from private hands to state agencies. Yet it must be acknowledged that profound scholarship is behind the movement toward the court-appointed expert, *e.g.*, Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. Chi. L. Rev. 285, 293 (1943); 2 Wigmore, Evidence 644 *et seq.*, although it is to be carefully noted that at least Wigmore would not *replace* but only *supplement* partisan expert testimony. *Id.* at 648. See Fed. R. Crim. P. 28; Uniform Rules of Evidence, National Conference of Commissioners on Uniform State Law, Rule 59, both of which provide for court-appointed experts but reserve to the parties the right to call expert witnesses of their own selection. The real reform in this field, it seems to the writer, as in so many other fields of professional activity, is greater integrity by the professional man. But such a reform is at once too simple, and too difficult!

candid in acknowledging the degree of certainty with which he holds his opinions. He will recognize that there is no innate excellence in professional jargon, and will clearly explain in words understandable by the non-psychologist the meaning of technical terms. He knows that carefulness and intellectual honesty are as recognizable, and even more important, inside as outside the courtroom. He will be frank to admit the limitations of his specialty or of his own expertise within it.[65] He will realize that his function, however important, is not to decide the case but to contribute what knowledge he can to those who have the burden of decision. However critical of particular lawyers, judges or juries, he will never be scornful of the judicial process. He will be at once, confident but not cock-sure; proud of his profession but humble in his awareness of human limitations.

The psychologist, indeed the scientist generally, may do well to match to a degree the law's conservatism with his own. Perhaps few things are so shocking to the conscience of a liberty-loving people, and therefore inimicable to the progressive application of sound scientific principles in the regulation of society, as the serious curtailment of human liberty by applying "scientific" conclusions unsupported by the underlying data, or by drawing in the name of science moral conclusions unwarranted by the realities.[66]

[65] "When testifying as an expert witness, a psychologist should make only such statements as he is qualified to offer on the basis of his professional training and experience, and which he can substantiate by evidence that would be acceptable to recognized specialists in his same field." Principle 1.22-2. Ethical Standards of Psychologists (proposed), American Psychological Association 14 (1953).

[66] Illustrative, to this writer, of such unjustified curtailments of liberty essentially in the name of science are the situations presented by Psychopathic Personality of Dittrich, 215 Minn. 234, 9 N. W. 2d 510 (1943) (law-abiding, capable, hard-working farmer, of good moral character, at least so far as his relations with the community were concerned, condemned to indefinite commitment under the psychopathic personality law because of his ardent sexual nature); *In re* Restoration to Capacity of Masters, 216 Minn. 553, 13 N. W. 2d 487 (1944) (mother of ten apparently normal children, two serving in army, committed as feeble-minded and family broken up, apparently essentially because she was thought a sloppy housekeeper; I.Q. fixed at 64 by psychological testing). See Louisell, Book Review, 79 The Scientific Monthly 332 (Nov. 1954).

Since this article went to press, *Watson v. State*, 273 S.W. 2d 879 (Tex. Cr. App. 1954) has been published, in which a psychologist testified as an expert on the issue of insanity in a murder case. See also *Hidden v. Mutual Life Ins. Co.* (4th Cir. 1954) 217 F. 2d 818, published after the author completed this article.

The Dead Man Statutes—A Revisit

C. Clyde Atkins*
Miami, Florida

As the author of the article "Can an Automobile Accident be a 'Transaction' under the Dead Man Statutes", which appeared in the April, 1953 issue of the Journal, the writer has been requested to prepare a supplementary discussion of cases decided since that time.

Candor impels the writer to say that the original article was slanted in favor of an affirmative answer. Justification for that approach lay in the fact that such appeared to be the better and majority view. Frankness requires the admission however that a subsequent event, while not changing the writer's personal views,[1] nonetheless put him on the losing side of a case involving the subject under discussion.

The event was the decision of the United States Court of Appeals for the fifth Circuit in *Kilmer v. Gustason*, 211 F. 2d 781 (1954). The result was an adjudication that in the absence of any direct ruling on the point by the Supreme Court of Florida, the court of appeals was bound by its previous holding (in a case governed by a similar Georgia statute[2])

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[1] Personal views presently entertained but with the right expressly reserved to change without notice if the exigencies of a given situation so require.

[2] *U.S.A.C. Transport, Inc. v. Corley*, 202 F. 2d 8 (1953).

wherein it had reached the conclusion that so long as the testimony was confined by the survivor of the accident exclusively to his own actions it did not impinge on the rule against recounting a "transaction" with the deceased victim.

A measure of dubious comfort perhaps may be derived from the fact that after saying its previous opinion was "decisive here", the court added:

> "In any event, however, Gustason's testimony on these matters was merely cumulative, and therefore harmless, as all the facts surrunding the collision were also established by the testimony of other and disinterested witnesses." (citing cases) (Text 783)

Kilmer was somewhat unusual in that it involved an accident which occurred in Iowa but was litigated in Florida with a visiting district judge from Alabama presiding at the trial. These circumstances, of course, required application of the substantive law of Iowa, but reference to Florida law on such procedural questions as the competency of witnesses. In grasping for straws of consolation, (which is not an uncommon practice where the concrete results have inured to the other side) the writer has noted that in *Turbot v. Repp*, 72 N.W. 2d 565 (1955), the Supreme Court of Iowa in 1955, while observing that "the decisions are in irreconcilable conflict as to the construction to be given Dead Man Statutes" and "although there is authority to the contrary in a number of jurisdictions," nonetheless held that there was no error in overruling objections to permitting "the defendant to testify to his own actions and what he observed of the actions of decedent and decedent's automobile." It thus apperas (for whatever it is worth) that if *Kilmer* had been litigated in Iowa the result would have been the same. At all events the Supreme Court of Florida in 1955 had occasion, for the first time, to pass on the question. This occurred in *Herring v. Eiand*, 81 So. 2d 647 and it too adopted *in toto* the philosophy adopted by the court of appeals in *Kilmer*.

The *Herring* case was an action by an incompetent, through her guardian, for personal injuries sustained in an automobile accident which occurred prior to her incompetency.

The plaintiff took the pretrial depositions of the defendant and his wife. These depositions revealed that all of the parties had played cards, with accompanying social drinking, throughout the evening previous to the accident and had started out about two o'clock in the morning on a fishing expedition; that while driving 40 to 45 miles per hour around a curve, through intermittent fog, the defendant pulled too far to the right and the car struck the concrete abuttment of a bridge while attempting to avoid an oncoming car which appeared to be on the wrong side of the road; further, that at and prior to the time of the accident, both defendant's wife and the plaintiff's incompetent were fast asleep in the car.

After the depositions had been taken, the defendant moved for a summary final judgment in his favor on the pleadings and depositions. He prevailed, and on appeal, plaintiff contended that the matter contained in the deposition of the defendant husband related to transactions or communications between the defendant and an insane person and were therefore precluded by the Florida Dead Man Statute (which puts death and insanity in the same category). The Supreme Court of Florida rejected this contention saying:

> "The answers of the defendant in his deposition were not with reference to a transaction with the incompetent as that term is used in section 90.05 supra, 3 Jones Evid. section 793, but dealt with the defendant's activities during the course of the evening and his actions and the speed and movement of his car immediately before the accident. There were, in our opinion, independent facts not a part of any transaction between the defendant and Elise Herring and consequently not subject to the bar of the statute. *Kilmer v. Gustason*, 5 Cir. 211 Fed. 2d 781; *U.S.A.C. Transport Inc. v. Corley* 5 Cir. 202 Fed. 2d 8."

As did the court of appeals in *Kilmer*, the Florida court went on to say that even if it be assumed arguendo that the husband's testimony was incompetent under the statute, the fact remained that the evidence of his wife was not so precluded and that her testimony "without consideration of her husband's corroborating statements plainly showed either that the defendant had not been drinking excessively prior to the time the parties set out

on their trip, or that to whatever extent he had consumed liquor or failed to obtain proper rest, these facts were known to Elsie Herring who thereafter, without warning or objection, embarked upon the expedition *and slept throughout the trip* and consequently, by assuming the risks of the journey, was guilty of contributory negligence which would bar recovery."

The phrase "and slept throughout the trip" is emphasized because it is difficult to perceive how the wife's evidence could have established such a fact when as is recited by the court elsewhere in the opinion "she (herself) was asleep at the time of the accident and could give no information as to its cause."

On the other side of the ledger, the Court of Civil Appeals of Texas in *Andreas v. McMillan,* 256 S.W. 2d 477, (1953) held "that the trial court had properly refused to allow introduction of testimony by plaintiff as to facts, circumstances and occurrances surrounding the collision" in which the defendant administrator's decedent came to his death.

By way of an analogy, the Supreme Court of Alabama similiarly ruled in *Burnett v. Garrison,* 75 So.2d 144, (1955). That case did not involve the question here under discussion but in determining the application of the Dead Man Statute to the matter there under consideration the court referred with approval to its earlier ruling in *Southern Natural Gas Company v. Davidson,* 225 Ala. 171, 142 So.63 (1932), that "in an automobile accident case, allowing the plaintiff to testify to conduct of defendant's deceased driver held reversible error since conduct constituted 'transaction' with deceased person."

Fick v. Herman, 159 Neb. 758, 78 N.W. 2d 622, is another late decision (1955). The plaintiff's decedent was a passenger in the car of one of the defendants which was involved in the fatal accident. This defendant attempted to offer testimony as to a conversation alleged to have been had with the decedent concerning the latter's conduct prior to and at the time of the accident. The trial court rejected such testimony and the Supreme Court of Nebraska on appeal, said, albeit somewhat cryptically, "in the present state of the record, the trial court did not err as contended for by appellants."

The Mississippi Supreme Court has dealt with the subject most recently, and probably most firmly. In unequivocal terms it held such testimony to be incompetent. The case was *Cross v. Frost,* 86 So.2d 296, (1956) and the surviving motorist's testimony was merely cumulative, Notwithstanding that circumstance, and after reviewing its previous decisions construing the statute, the court said:

> "Because of the salutary provisions of [the statute] this Court will not countenance its repeal by judicial legislation."

When engaged in research one frequently runs across unusual cases and this instance was no exception.

Among the decisions noted was *Clark v. Douglas* (W. Va.) 81 S.E. 2d 112, (1954). That was an action for trespass brought against an administrator whose decedent, during his lifetime, allegedly shot the female plaintiff. She testified that while living in the defendant's home she awakened one night and "there was a gun pointing toward me . . . there was a window right by my bed and I jumped for (it) . . . and when I was in the window I was shot." Commenting that other evidence adduced by the plaintiff "establishes or at least would warrant a jury finding that no person other than plaintiff and decedent George Douglas was in the dwelling at the time the shot was fired", the appellate court reversed for a new trial. It said:

> "In such circumstances the testimony of the plaintiff told the jury plainly and definitely that George Douglas was the person who fired the shot and constituted testimony of plaintiff of 'a personal transaction or communication' with George Douglas."

Under the rulings in *Kilmer and Herring,* as previously noted, that in any event the testimony objected to was merely cumulative, the appellee in the case last cited should have prevailed upon the evidence of two police officers. They testified that when they arrived on the secene and queried Douglas, he said "Yes, I shot her. The damn bitch poisoned me."

If the last cited case is so foreign to the subject under consideration as to have no legitimate place in the discussion, then the presence of the next and last to be

noted can perhaps be justified on the ground that at least an automobile was involved.

Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96, (1955) was a husband's action against the administrator of a decedent who allegedly had alienated the affections of the plaintiff's spouse. Among other things, the plaintiff testified that he saw the decedent and his (plaintiff's) wife as they got into an automobile and drove away from a secluded cabin; that he gave chase and finally ran them down on a dead end road; that his wife was crouched down on the floor boards of the decedent's car and that the culprits stayed inside with the windows closed until he (plaintiff) got a hatchet, broke the windows and then hit the decedent in the face with it.

Rejecting the contention that the admission of such testimony violated the Dead Man Statute, the Supreme Court of North Carolina said, "to hold this testimony incompetent because it concerned 'a personal transaction or communication' between the plaintiff and the deceased . . would violate human nature and brand plaintiff as a willing cuckold."

Whatever may be the readers' reaction to the subject particularly under consideration, the writer supposes that this ruling of the North Carolina court will find favor with the majority.

From The Editor's Notebook

In this column, from time to time, the Editor proposes to publish news and views that he believes will be of interest to our members. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed.

Members of I.A.I.C. are cordially invited to submit material for this column. If and when you have views to express on insurance and legal subjects, or when you learn of items of news that you believe of general interest, send them in! As space permits, we'll publish them with credit to you as the contributors.

Trial lawyers predominate in the membership of this Association. For that reason—among others—we sought and obtained permission to publish the address, "Shall Advocacy Vanish?", delivered by our Past President J. A. (Tiny) Gooch to the Washington State Bar Association, at its meeting at Tacoma, on August 4, 1956. In these days of administrative law—arbitration—unsatisfied judgment funds—compensation for the automobile accident victim—and what not, the future of advocacy hangs in the balance. There are various aspects to this problem. Some of them were touched on by Past President Lester P. Dodd, in his annual address last July at the Greenbrier.[1] Other phases of the matter were discussed by Mr. Gooch in his president's address in 1954.[2] What "Tiny" said at Tacoma makes a lot of sense to us. We urge you to read it, beginning on page 385 of this issue.

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[1]"The Vanishing Tribe", XXIII Insurance Counsel Journal, page 247

[2]"Shall the Trial Lawyer Vanish?", XXI Insurance Counsel Journal, page 231

Also worth reading is an article by Ed Cony in the *Wall Street Journal* of August 6, 1956, wherein he tells of the efforts of NACCA lawyers to increase jury verdicts and compensation awards. "Personal injury lawyers aren't content merely to argue their cases in court", he says. "They're working to broaden workmen's compensation laws and to push through other legal changes that will make higher damage awards possible."

As an example of those efforts, Mr. Cony points out that NACCA attorneys "are trying to get the United States to withdraw from the Warsaw Convention of 1929, a treaty which places a top limit of $8,300 on the liability of airlines for death or injury on international flights." He says, "The White House is now studying a proposed amendment to the Warsaw treaty, drafted last year at The Hague, The Netherlands, which would up the maximum award to $16,600. The N. A. C. C. A.'s aviation committee sees this as a chance to withdraw from the agreement entirely and the committee has a promise from the State Department to be heard before a recommendation is made to the President."

Observing that, "Naturally enough personal injury attorneys abhor any statutory limits on the amount of damages that can be awarded to their clients," Mr. Cony tells of NACCA efforts "to remove monetary limits on death claims in 17 states within the U. S." and of the drive to get state legislatures to enact comparative negligence laws.

After quoting figures to show that in New York State jury awards averaged $11,576 in 1954 as compared with $5,350 in 1946, Mr. Cony says, "Soaring jury awards are of significance to Americans, whether they're ever involved in personal injury cases or not. The higher awards lead to higher insurance rates—on workmen's compensation policies and on liability coverage of automobiles, homes and businesses. The total outlay for such insurances is enormous."

A hospital's liability for injury resulting from a blood test performed by a technician employed and paid by the hospital was established in the recent decision of the New York Court of Appeals in *Berg v. New York Society for the Relief of the Ruptured and Crippled*, 1 N. Y. 2d 499.[3] The technician was a salaried employee of the hospital whose training covered a period of only four to six weeks. The court's opinion refers to *Schloendorf v. Society of New York Hospital*, 211 N. Y. 125, but says that this case need not be pushed into that rule. The *Schloendorf* rules were, first, that hospitals were "charities", (which was later abandoned, at least as to paying patients) and, second, that there was no "respondeat superior" situation because the hospitals were not really the "employers" of the physicians and nurses who worked there. The Journal hopes to publish an article surveying the entire field of the liability of hospitals and like institutions, in an early issue.

The increasing number of deaths and injuries arising from automobile accidents and the multiplicity of law suits resulting therefrom are subjects that continue to consume much space in legal and insurance publications. The seriousness of the situation is emphasized by John P. Kenneally, New York Resident Vice-President of New Amsterdam Casualty and United States Casualty, in an article in the September 15, 1956, issue of *The Weekly Underwriter*. Writing on the topic, "Negligence—A Name Only?", Mr. Kenneally says, "The social problem created by the evolution of the mental attitude of a majority of an accident conscious public, especially in the larger metropolitan areas, has challenged the best minds of bench, bar and industry. The solution is not simple, if indeed, there is a solution."

That article discusses various efforts that have been made to deal with these problems and observes that the 1948 report of Sterling James, sponsored by Yale Law Journal, establishes that in 90 per cent of cases wherein the defendant is insured settlements are made out of court and not by formal trial. The writer concludes, "A new set of standards is replacing the law of negligence. It is the law of action, the negotiation for settlement. The fact remains that we have a much closer approach today to absolute liability in practise than in theory."

Ella Graubart, of the Pittsburgh Bar, writing in the September issue of the *American Bar Association Journal*, deals with the same problems. She commences her article by saying, "No one familiar with the trial of cases involving automobile accidents can deny that some improvement is necessary in their disposition. Many lawyers resent efforts to change the law, but they cannot escape the suspicion of being accessory to a system from which they derive a substantial advantage."

Miss Graubart is critical of counsel on both sides of the table. She says:

"With such high stakes have come practices which the Bar cannot long ignore—ambulance chasing, perjury of witnesses, payment of hospital and doctor bills by lawyers, prejudiced medical testimony, claims which are exaggerated by the use of skeletons, colored anatomical pictures, exhibits, x-rays and other paraphenalia which plaintiff's counsel thinks will move the jury to allow more than his case is worth.

"On the other side of the table, experienced counsel for the insurance companies maneuver to minimize damages by every trick which experience has proved leads to a small verdict or an occasional verdict for the defendant.

"Counsel for the defendants retained by insurance companies are usually paid on a per diem basis. They, therefore, are not interested in settlements before a jury is picked, *i. e.*, before they have a day in court. Both plaintiffs' and defendants' lawyers in these negligence cases which occupy approximately 75 per cent of all of the time of the courts, have a cynical disregard of the burden which the taxpayers carry to provide an arena for the trial and settlement of negligence cases."

Asserting that, "Some change is inevitable", Miss Graubart recommends a study of the economic, social and psychological effects of the present system, to be made by "objective research men who can make an unbiased report with recommendations based upon factual data."

[3]Called to our attention by William F. Martin, New York, N. Y.

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Abramson, Marcus, 315 E. 206th St., New York 67, N. Y.

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